No.

In the Supreme Court of the United States

WILLIAM H. HOGAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ALASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

KALTAG TRIBAL COUNCIL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Alaska is home to roughly 230 Native Villages that are federally recognized as Indian tribes. Under this Court's decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), none of those tribes (save one not at issue here) occupies Indian country. The population of members and nonmembers living within and around Alaska Native Villages is relatively interspersed, increasing the prevalence of children born to parents of different Native Villages or to one Native and one non-Native parent. The Ninth Circuit—the circuit that sets the precedent for virtually all federal cases involving Indian tribes in Alaska—has adopted an extraordinarily broad conception of the jurisdiction and authority of Alaskan tribes, which fails to account for the fundamental limits repeatedly recognized by this Court on the exercise of tribal authority with respect to nonmembers. The question presented is as follows:

Whether the Ninth Circuit correctly held—in conflict with the decisions of this Court and other courts as well as with the express intent of Congress—that the hundreds of Indian tribes throughout the State of Alaska have authority to initiate and adjudicate child custody proceedings involving a nonmember and then to compel the State to give full faith and credit to the decrees entered in such proceedings.

PARTIES TO THE PROCEEDING

Petitioners are William H. Hogan, Patrick B. Hefley, and Phillip Mitchell. Hogan and Hefley are sued in their official respective capacities as Commissioner and Deputy Commissioner for Family, Community, & Integrated Services of the Alaska Department of Health and Human Services. Mitchell is sued in his capacity as Section Chief of the Alaska Division of Vital Statistics. Defendants-appellants below were Karleen Jackson, William H. Hogan, and Phillip Mitchell. Hogan and Hefley have been substituted for the previously named defendants (who were also sued in their official capacities) pursuant to Supreme Court Rule 35.3. Petitioners have responsibility for issuing new birth certificates recognizing valid adoptions in Alaska.

Respondents, plaintiffs-appellees below, are the Kaltag Tribal Council of the Native Village of Kaltag, and Hudson and Salina Sam. The Kaltag Tribal Council is the elected leadership of the Native Village of Kaltag, a federally recognized tribe headquartered within the city of Kaltag, Alaska. Hudson and Salina Sam are not members of the Village of Kaltag. After purporting to terminate the parental rights of N.S.'s natural parents, the Kaltag Tribal Council bestowed permanent guardianship on the Sams, and later purported to authorize their adoption of N.S.

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PETITION FOR WRIT OF CERTIORARI

William H. Hogan, in his official capacity as Commissioner of Alaska Department of Health and Human Services, *et al.* (collectively, the "State of Alaska" or "Alaska"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1a-3a) in this case is reported at 344 Fed. App'x 324. The opinion of the court of appeals in *Native Village of Venetie I.R.A. Council v. Alaska* (App.29a-58a)—on which the court of appeals expressly grounded its decision below, App.2a-3a—is reported at 944 F.2d 548.

The opinion and order of the district court (App.4a-20a) granting summary judgment for respondents and denying summary judgment for petitioners is unpublished. The tribal court adoption decree and related orders (App.21a-28a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2009. App.1a. A timely petition for rehearing and for rehearing en banc was denied on October 14, 2009. App.59a-60a. On January 7, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 11, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. § 1901 *et seq.*, are reprinted at App.61a-78a.

INTRODUCTION

This case raises jurisdictional issues of extraordinary importance concerning the authority of Indian tribes in Alaska over individuals who are not tribal members outside Indian country. Specifically, it arises from a dispute between the State of Alaska and the Native Village of Kaltag—a federally recognized Indian tribe in Alaska—concerning the tribe's effort to enforce a decree entered in a child custody proceeding involuntarily initiated in tribal court involving non-members domiciled outside of Indian country.

Relying on its prior decision in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) ("*Venetie I.R.A. Council*"), the Ninth Circuit

held that the tribe possessed the jurisdiction and authority to initiate such a child custody proceeding and to compel the State to give full faith and credit to the tribal court decrees entered in that proceeding. App 2a. Among other things, the court refused to attach any significance to the fact that one of the natural parents—and both adopting parents—are not members of the tribe. That decision directly conflicts with the decisions of this Court and other courts refusing to permit "'the extension of tribal civil authority over nonmembers on non-Indian land.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2722 (2008) (quoting *Nevada v. Hicks*, 533 U.S. 353, 360 (2001)). Indeed, the Ninth Circuit's conception of tribal jurisdiction and authority over nonmembers domiciled on non-Indian land is fundamentally out of step with this Court's precedents.

The Ninth Circuit's decision also unravels the statutory scheme devised by Congress in the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. § 1901 *et seq.* After carefully balancing the interests of parents and children, States, and tribes in such matters, Congress chose to authorize the *transfer* from state court to tribal jurisdiction of child custody proceedings involving Indian children off-reservation, but *only* "absent objection by either parent" or "good cause to the contrary." 25 U.S.C. § 1911(b). The Ninth Circuit rule permits tribes to circumvent the ICWA's transfer provision—and its important checks—by simply initiating child custody proceedings in tribal court *first*. And, as such, it invites a dangerous race by tribes to exercise jurisdiction in such sensitive matters—to the potential detriment not only of the

State's *parens patriae* interests but of the welfare of the affected children and their parents.

The Ninth Circuit's decision has enormous practical consequences for the State of Alaska, as well as the thousands of children of mixed tribal or ethnic heritage who live in Alaska and their parents. Alaska is home to roughly 230 federally recognized tribes—none of which occupies Indian country (save one). Under the Ninth Circuit rule, any one of these tribes could initiate—and thereby establish jurisdiction over—custody proceedings without regard to whether the parents are members of the tribe. And given that the population of members and nonmembers living within and around Alaska Native Villages is relatively interspersed, it is commonplace for child custody proceedings in Alaska to involve parents of different tribes or one Alaskan Native and one non-Native parent. Indeed, the State's child protection service is currently overseeing *hundreds* of active cases in which a child has parents who are members of two different tribes.

Given the profound importance of rules governing the reach of tribal authority over nonmembers outside of Indian country, not to mention matters concerning the well-being of children and the heart of the parent-child relationship, this Court's review is needed.

STATEMENT OF THE CASE

A. Statutory Background

1. The State of Alaska, like all States, has a duty and a "special, indeed compelling, interest in the health, safety, and welfare of its minor citizens." *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 582 (Alaska 2007). In carrying out that special duty, the State has enacted a comprehensive child in need of aid

(CINA) statute and related child protection laws and regulations. *See* Alaska Stat. §§ 47.10.005-.142 (CINA); *id.* §§ 47.17.010-.290 (child protection). These provisions apply to all children in Alaska and "shall be liberally construed to ... promote the child's welfare and the parents' participation in the upbringing of the child to the fullest extent consistent with the child's best interest." *Id.* § 47.10.005. Among other things, Alaska's CINA law imposes special requirements on the conduct of hearings and the orders that may be entered in such cases. *See id.* §§ 47.10.070-.084.

2. Congress passed the ICWA in 1978 "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. The Act establishes two mechanisms whereby Indian tribes—including Alaska Native Villages, 25 U.S.C. § 1903(8)—may assert jurisdiction over Indian child custody proceedings. First, Section 1911(a) provides that tribes shall have "[e]xclusive jurisdiction" to adjudicate a "custody proceeding involving an Indian child who resides ... within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." 25 U.S.C. § 1911(a). Second, Section 1911(b) authorizes the "transfer" from state court to tribal jurisdiction of custody proceedings involving "an Indian child not ... residing within the [tribe's] reservation"—but only "absent objection by either parent" or "good cause to the contrary." *Id.* § 1911(b). The Act further obligates States to "give full faith and credit to the ... judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent" as other proceedings. *Id.* § 1911(d).

The ICWA creates a variety of mechanisms to enable Indian tribes to assert an interest, if they so choose, in a state child custody proceeding involving an Indian child domiciled *outside* the reservation. First, the ICWA requires that state courts provide notice to a child's tribe that a custody proceeding is pending in state court, *id.* § 1912(a), and authorizes the tribe to intervene in that proceeding, *id.* § 1911(c). Second, Section 1918 sets out a separate process by which an Indian tribe may petition the Secretary of the Interior in order to obtain either exclusive or referral jurisdiction over "child custody proceedings" in certain circumstances. *Id.* § 1918.[1] Finally, tribes may enter into consensual agreements with States respecting the care and custody of Indian children and jurisdiction over child custody proceedings. *Id.* § 1919.[2]

B. Factual Background

1. The Native Village of Kaltag is a federally recognized Indian tribe in Alaska. Like almost all other Indian tribes in Alaska, the Village of Kaltag does not occupy Indian country. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998). Instead, it exists as part of a municipality—the city of Kaltag—located in west-central Alaska on a 85-foot

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[1] Three Alaska Native Villages—but not respondent here—have applied for and received the Secretary's approval under Section 1918 to exercise certain jurisdiction under Section 1911.

[2] Likewise, Alaska law provides tribes with mechanisms by which they may trigger state executive or judicial action regarding child welfare. *See, e.g.*, Alaska Stat. § 47.10.020 (affording any party the right to ask the state to undertake an investigation of a child's circumstances).

bluff along the western bank of the Yukon River. The town lies along the Kaltag Portage, an ancient trail leading east through the nearby mountains to Unalakleet, used by Natives and fur traders centuries ago—and used today as part of the Iditarod Trail Dog Sled Race, for which Kaltag is a checkpoint. Although the site was long used by Koyukon Athabascans as a cemetery, the town of Kaltag was not established until the early twentieth century, at the peak of steamboat activity along the Yukon River, when individuals from nearby seasonal villages resettled to Kaltag following local food shortages and a measles epidemic.[3]

In 2008, Kaltag had 188 inhabitants—both Native and non-Native, though primarily the former. The city of Kaltag has a mayor, a state-owned and operated airport, a health clinic, and a public school. The Village of Kaltag exists as a separate government. It elects a Tribal Council composed of five members, which, among other things, is empowered to create temporary ordinances and to "act as judges of minor offenses or small differences among village residents." App.82a.

2. This case arose when the Village of Kaltag initiated involuntary child protection proceedings in Kaltag Tribal Court—an arm of the Tribal Council—involving N.S., a child born on October 18, 1999. N.S.'s mother is a member of the Village of Kaltag. N.S.'s father is not; he is a member of the Native Village of

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[3] *See* Alaska Division of Community and Regional Affairs, State of Alaska, *Alaska Community Database Community Information Summaries*, *available at* http://www.commerce.state.ak.us/dca/commdb/CIS.cfm?Comm_Boro_name=Kaltag (last visited Feb. 4, 2009).

Koyukuk, located some 50 miles to the northeast. App.4a. In 2000, the Kaltag Tribal Council took "emergency custody" of N.S. due to concerns about her mother's ability to care for N.S. and her physical well-being and initiated an action with the Kaltag Tribal Court resulting in the tribal court's assumption of "temporary custody" of N.S. App.4a-5a.

In 2004, the Kaltag Tribal Court placed N.S. with Hudson and Selina Sam for foster care. App.28a. The Sams are not members of the Village of Kaltag, but rather of the Village of Huslia, located some 117 miles to the northeast of Kaltag in the Koyukuk National Wildlife Refuge. Later that year, the Kaltag Tribal Court purported to terminate the parental rights of N.S.'s biological parents, make N.S. a ward of the Tribal Court, and grant permanent guardianship over N.S. to the Sams. App.26a. In 2005, after the Sams petitioned their own tribal court to adopt N.S., the Kaltag Tribal Court issued an Order of Adoption decreeing that N.S. "shall be the child of [the Sams] for all legal purposes from this time forward." App.22a. At no point during this time was the State of Alaska made aware of these tribal court proceedings.

The Kaltag Tribal Court submitted its adoption decree to the Alaska State Bureau of Vital Statistics and requested a new birth certificate for N.S., listing the Sams as N.S.'s new parents. App.5a. Alaska notified the Kaltag Tribal Council that the tribal court had no jurisdiction or authority to initiate adoption proceedings in this matter and invited the Kaltag Tribal Council to submit a "cultural adoption" packet instead. *See* 7 Alaska Admin. Code tit. 7, § 5.700 (recognizing cultural adoptions executed under tribal custom). The Kaltag Tribal Council then commenced

this action in federal district court under the ICWA and 42 U.S.C. § 1983, arguing that the State was obligated to give effect to the Kaltag Tribal Court's adoption order under the ICWA's full-faith-and-credit provision, 25 U.S.C. § 1911(d), and seeking declaratory and injunctive relief to that effect. App.6a.

C. Decisions Below

1. The district court granted summary judgment for respondents. The court recognized that the child custody proceedings at issue were neither "voluntary, nor among [tribal] members," App.16a. The court nevertheless concluded that the tribe possessed jurisdiction to initiate and adjudicate the proceedings. *See* App.16a-19a. In so holding, the court agreed with respondents that "the substantive issues in this case already have been decided by the Ninth Circuit in [*Venetie I.R.A. Council*]." App.15a. The court therefore ordered the State to give full faith and credit to the tribal court's decrees under the ICWA § 1911(d), and to issue N.S. a new birth certificate. App.19a.

2. The Ninth Circuit affirmed. The court held that the conclusion that the State was required to give full faith and credit to the tribal court's adoption decree was "compelled by this circuit's binding precedent"—namely, *Venetie I.R.A. Council*. App.2a. Indeed, the court was apparently so convinced of that conclusion that it reached its disposition in an unpublished decision. The Ninth Circuit subsequently denied the State's petition for rehearing. App.59a-60a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in this case holds that Alaska's Indian tribes have the jurisdiction and authority to initiate and enforce child custody

proceedings involving nonmembers residing off-reservation. For three overriding reasons, that decision merits this Court's review. *First*, the sovereign authority of the State vis-à-vis Indian tribes—not to mention the State's ability to carry out its *parens patriae* duty to provide for the well-being of its children—is a matter of exceptional importance. *Second*, the Ninth Circuit rule rests on a far-reaching conception of tribal authority over nonmembers living off-reservation, which directly conflicts with the decisions of this Court and other lower courts, as well as with the express intent of Congress. And *third*, the Ninth Circuit's decision has enormous practical consequences for Alaska, where there are hundreds of Indian tribes throughout the State and thousands of Indian children with at least one nonmember parent. Certiorari, in short, is plainly warranted.

I. THE QUESTION PRESENTED IS EXTRAORDINARILY IMPORTANT AND SHOULD BE RESOLVED BY THIS COURT

The question presented by this case concerns a matter of vital governmental importance. As underscored by the legion of cases that this Court has decided throughout its history establishing—and enforcing—the limits of tribal sovereign authority vis-à-vis the States, the authority of Indian tribes to regulate matters traditionally reserved to the States is an issue of touchstone importance. Under the Ninth Circuit's decision below—and the "binding [circuit] precedent" on which it is based, App.2a—the roughly 230 Indian tribes in Alaska possess the sovereign power to initiate and adjudicate child custody proceedings involving nonmembers outside Indian country. What is more, because the domicile of a

nonmember parent is irrelevant under the Ninth Circuit rule, App.17a, there is no territorial limit—not even Alaska's—on the scope of an Indian tribe's authority over nonmembers in child custody matters.[4]

The Ninth Circuit rule affects thousands of parents and children. According to the 1990 census, more than 70% of married Indians nationwide married outside their race, and approximately 50% of Indian children have at least one non-Indian parent.[5] In Alaska, moreover, it is particularly common for children to be born to parents of different tribes or to one Native and one non-Native parent. Unlike Indian tribes in lower 48 States, "[t]he Native villages and communities of Alaska were not organized on 'tribal' lines, and the village rather than the ethnological tribe [was] the central unit of organization." *Atkinson v. Haldane*, 569 P.2d 151, 155 n.12 (Alaska 1977). Indeed, many villages

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[4] This is not a matter of academic significance. Under the ICWA, Native Alaskan Villages have intervened in a number of custody proceedings arising in state courts outside Alaska involving children of mixed tribal or ethnic heritage. *See, e.g., In re Taylor*, 2006 Ohio 6025 (Ct. App. Nov. 13, 2006); *Mahaney v. Mahaney (In re Interest of Natasha Mahaney)*, 51 P.3d 776 (Wash. 2002); *In re Crystal K.*, 226 Cal. App. 3d 655 (Ct. App. 1990). Yet, under the decision below, they could involuntarily initiate such proceedings in tribal court.

[5] *See* U.S. Census Bureau, *1990 Census of Population and Housing*, Table 2, Race of Couples: 1990 (June 22, 1994), *available at* http://www.census.gov/population/socdemo/race/interractab2.txt (last visited Feb. 8, 2010); *id.* at Table 4, Race of Child by Race of Householder and of Spouse or Partner: 1990 (June 22, 1994), *available at* http://www.census.gov/population/socdemo/race/interractab4.txt (last visited Feb. 8, 2010).

will extend membership to any person of Alaskan Native descent, without regard to one's ancestral village(s) or particular ethnic heritage.[6] Likewise, the practical realities of modern village life make intra-tribal relationships unexceptional. Many Alaskan villages are composed only of several dozen families or less, and are declining in size due to out-migration (especially of women), increasing the likelihood and necessity of relationships outside the village.[7] And a sizable portion of Alaska's Natives do not live in villages at all, but in urban Alaska—almost 30% in Anchorage, Fairbanks, and Juneau alone. In such settings, relationships between members of different tribes or Natives and non-Natives are commonplace.

For all these reasons, child custody proceedings often involve parents who are members of different Alaska Native Villages. *See, e.g., In re Adoption of Sara J.*, 123 P.3d 1017, 1020 (Alaska 2005); *Evans v. Native Vill. of Selawik IRA Council*, 65 P.3d 58, 59 (Alaska 2003); *In re C.R.H.*, 29 P.3d 849, 850 (Alaska 2001). Indeed, Alaska's Office of Children's Services is currently overseeing *hundreds* of active cases in which a child is potentially eligible for membership in two (or more) tribes as a result of a mixed tribal heritage.

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[6] *See, e.g.*, Native Village of Eyak, *Enrollment Eligibility*, http://www.nveyak.com/pages/enrollment.html (last visited, Feb. 8, 2010); Native Village of Koyuk Const. and Laws art. 2, § 4, *available at* http://www.kawerak.org/tribalHomePages/koyuk/const.html (last visited Feb. 8, 2010).

[7] *See, e.g.*, William Yardley, *Alaska's Rural Schools Fight Off Extinction*, N.Y. Times, Nov. 26, 2009, at A1; *see also* Stephanie Martin, *The Effects of Female Out-Migration on Alaska Villages*, Polar Geography, 32: 1, 61-67 (2009).

Likewise, in part because Alaska's communities have long been integrated, many Alaskan children share a mixed Native and non-Native heritage. Historically, most Indian tribes in the contiguous United States were long sequestered from a local, non-Native population that often became the Indians' "deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). In contrast, Alaskan Natives were never displaced from their aboriginal lands by treaty or war, and "[t]here was never an attempt in Alaska to isolate Indians on reservations." *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 51 (1962). To the contrary, Alaska natives have always been integrated into Alaskan society to a degree rarely present with respect to the Indian tribes in the lower 48 States. Stephen Haycox, *Alaska: An American Colony* 162 (2002) (discussing the role of Alaska natives in settling towns and assisting important industries).

This history of integration and multiculturalism is manifest and still at work in Alaska today. In the 2000 decennial census, for example, Native Alaskans comprised only 33.4% of the 172,000 individuals residing in "Alaska Native Village statistical areas."[8]

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[8] National Center for Educational Statistics, U.S. DOE, *Status and Trends in the Education of American Indians and Alaska Natives: 2008*, U.S. Dep't of Commerce, *Summary Population and Housing Characteristics*, table 34, based on *Decennial Census, 2000, available at* http://nces.ed.gov/pubs2008/nativetrends/tables/table_1_2d.asp (last visited Feb. 8, 2010). By comparison 96.4% of the 180,000 individuals populating the Navajo reservation identified as Navajos. Navajo Nation, *An Overview of the Navajo Nation—Demographics*,

And the degree of integration is even greater in urban Alaskan settings. It follows that marriages and relationships between Native Alaskans and non-Native Alaskans, and among members of different Alaska Native Villages, are relatively commonplace across the State, and that thousands of children are members of such families. As a result, it is practically routine for a child custody dispute to involve one Alaska Native parent and one non-Native parent, or parents from different Native Villages. *See* p.11 n.14, 12, *supra*.

The extraordinary importance of this case to the State of Alaska is alone a compelling reason to grant the writ. *See Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 526 (certiorari granted to determine whether lands conveyed under the Alaska Native Claims Settlement Act constitute Indian country); *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 599 (1943) (certiorari granted "because of the importance of the cases in the administration of Indian affairs and to the state of Oklahoma"). "At issue here is not only Indian sovereignty, but also necessarily state sovereignty as well." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 181 (1980) (Rehnquist, J., concurring in part).

And the importance of this case is magnified by the subject matter of the underlying dispute. This case concerns the exercise of jurisdiction over—and the termination of—the parent-child relationship. As this Court has observed, "a natural parent's desire for and right to the companionship, care, custody, and

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http://www.navajobusiness.com/fastFacts/demographics.htm (last visited Feb. 8, 2010).

management of his or her children is an interest far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (internal quotation marks and citations omitted); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (describing the right to child custody as "essential"). There is an undeniable need for clear jurisdictional rules governing the exercise of government authority in court proceedings concerning the parent-child relationship.

This Court has granted certiorari on several prior occasions to address the proper allocation of authority among States and Indian tribes over child custody cases.[9] It is imperative—for the State and citizens of Alaska—that the Court do so again here.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS, AS WELL AS WITH THE INTENT OF CONGRESS IN THE ICWA

The question presented in this case is not only exceptionally important, but also the subject of a sharp conflict of authority. Indeed, the Ninth Circuit's decision directly conflicts with the decisions of this Court and other federal and state courts, as well as with the intent of the National Legislature.

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[9] *See, e.g., Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), *Fisher v. Dist. Court of Sixteenth Judicial Dist.*, 424 U.S. 382 (1976) (per curiam); *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425 (1975).

A. The Conflict With This Court's Cases

The Ninth Circuit's conclusion that Alaska's Indian tribes possess the power to initiate and adjudicate child custody proceedings involving nonmembers even when domiciled outside Indian country represents a dramatic departure from this Court's precedents.[10]

1. This Court has since the days of Chief Justice Marshall "recognized Indian tribes as 'distinct, independent political communities' qualified to exercise many of the powers and prerogatives of self-government." *Plains Commerce Bank*, 128 S. Ct. at 2718 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). At the same time, however, the Court has long emphasized that Indian tribal sovereignty "is of a unique and limited character." *Id.* (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650

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[10] The fact that the Ninth Circuit's decision in this case is unpublished in no way cuts against granting certiorari. According to the Ninth Circuit, the result in this case was "compelled by ... binding [circuit] precedent," i.e., *Venetie I.R.A. Council*. App.2a. This Court frequently grants review of unpublished decisions that are governed by binding circuit precedent. *See, e.g., Hardt v. Reliance Standard Life Ins. Co.*, No. 09-448 (U.S. Jan. 15, 2010); *Crawford v. Metropolitan Gov't of Nashville*, 552 U.S. 1162 (2008). Moreover, under the Ninth Circuit's rules, an unpublished decision may be precedent under the rules of issue preclusion. Ninth Cir. R. 36-3. Because Alaska's courts have rejected the argument that collateral estoppel does not lie against the State, *see State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 961-62 (Alaska 1995), Alaska may well be precluded from relitigating this issue in future cases. *Cf. Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 689-90 (9th Cir. 2004) (looking to Idaho state law to determine whether to apply nonmutual collateral estoppel against Idaho).

(2001) ("inherent sovereignty of Indian tribes was limited to 'their *members* and their *territory*'") (citation omitted) (emphases added). "'[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'" *Plains Commerce Bank*, 128 S. Ct. at 2718-19 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)) (alteration in original). In particular, as this Court has observed, "with one minor exception, we have *never* upheld ... the extension of tribal civil authority over nonmembers on non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (emphasis added); *see Plains Commerce Bank*, 128 S. Ct. at 2718 (noting that tribal sovereignty focuses "on tribal members within the reservation").[11] Accordingly, it is well-settled that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are *'presumptively invalid.'*" 128 S. Ct. at 2720 (citation omitted) (emphasis added).[12]

Weighty constitutional and practical considerations support the limits on tribal authority over nonmembers outside the reservation. Tribal sovereignty is "a sovereignty outside the basic structure of the Constitution." *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring). A tribe's jurisdiction

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[11] As the Court explained in *Plains Commerce Bank*, even the lone "exception"—which involved a tribe's zoning restrictions on nonmember fee land *within* a reservation—"fits the general rubric noted above." 128 S. Ct. at 2722.

[12] To be clear, the State does not challenge the inherent sovereignty of federally recognized tribes in Alaska. The purpose of this petition is to seek clarification of the precise *scope* of that sovereignty in the specific context of jurisdiction over nonmembers residing off-reservation in child custody proceedings.

over its members is "justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Duro v. Reina*, 495 U.S. 676, 694 (1990). In contrast, "nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 128 S. Ct. at 2724.

The Ninth Circuit's decision below directly conflicts with those precedents. In particular, the Ninth Circuit failed to account for the fact that—as the district court recognized (App.16a)—the child custody proceedings in this case were *not* "among tribal members." Rather, as discussed, both the biological father and the adopting parents were members of *other* villages. App.4a-5a. Moreover, this case was initiated as an *involuntary* child custody proceeding concerning a child who was removed by tribal authorities from her mother's home, and involved the termination of a nonmember's parental rights. *Id.* Under this Court's precedents, the involvement of nonmembers domiciled outside of Indian country defeated the tribe's assertion of jurisdiction and authority in this case. Indeed, the Ninth Circuit's decision in this case propounds a conception of tribal sovereignty that vastly exceeds that recognized by any of this Court's precedents.

What is more, the Ninth Circuit grounded its decision in this case on circuit precedent—*Venetie I.R.A. Council*—that not only was decided before this Court issued its landmark decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. at 523, on the scope of Indian country in Alaska, but that pre-dates many significant pronouncements by this Court on the scope of tribal sovereignty as to nonmembers off-

reservation, including *Plains Commerce Bank*, *Hicks*, and *Atkinson Trading Co.* Without even recognizing the import of those controlling precedents, the Ninth Circuit simply invoked *Venetie I.R.A. Council* and held that the district court's decision ordering the State to give full faith and credit to the tribal court's adoption decree was "compelled" by that case. App.2a. There is no reason for this Court to leave the Ninth Circuit case law frozen in time—at *Venetie I.R.A. Council*.

The lower courts held that "it is the membership of the child that is controlling, not the membership of the individual parents." App.17a. That is incorrect—and fails to account for the vitally important rights and interests of *parents* at stake in such proceedings. As this Court has observed, "the interest of *parents* in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (emphasis added). And it should go without saying that child custody proceedings—especially those seeking to *sever* the bonds of natural parents from their children—directly concern the rights of *both* children and parents. *See Parham v. J.R.*, 442 U.S. 584, 601-02 (1979) (recognizing that the due process interests of *both* parents and children are implicated by child commitment proceedings); *Santosky*, 455 U.S. at 759 (decision to terminate parental rights works "'a unique kind of deprivation'" of a *parent's* "fundamental liberty interest") (citation omitted). Indeed, the tribal court decree at issue expressly purported to terminate the rights of both natural parents "from this time forward." App.22a. Moreover, as this case illustrates, the fact that a child

custody proceeding *involves* a member does not mean that the proceeding is *among* members.[13]

B. The Conflict With Other Courts' Cases

The Ninth Circuit's decision also conflicts with the decisions of other lower courts. In particular, the other circuits with the greatest responsibility for the maintenance of Indian law have recognized that tribal membership is ordinarily *indispensable* to the exercise of tribal jurisdiction. *See, e.g., Nord v. Kelly*, 520 F.3d 848, 853-54 (8th Cir. 2008) (tribal court lacks jurisdiction over nonmember even where accident arises on the "equivalent of non-Indian fee land within the reservation"); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998) (The Supreme Court's decisions do not "allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*."); *see also MacArthur v. San Juan County*, 497 F.3d 1057, 1070-71 (10th Cir.), *cert. denied*, 552 U.S. 1182 (2007).[14] In the Ninth Circuit, in stark

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[13] To be sure, the ICWA looks to the domicile of the Indian child to determine what statutory rules apply. *See* 25 U.S.C. § 1911(a), (b). Congress is free to use that short hand. But that by no means leads to the conclusion that the nonmember status of a parent (or other party) is irrelevant to the exercise of the tribe's *inherent* authority over such an individual when it comes to, say, the termination of his parental rights.

[14] Other circuits have recognized these fundamental limitations on the exercise of tribal sovereignty as well. *See, e.g., Bank One, N.A. v. Shumake*, 281 F.3d 607, 612 (5th Cir.) ("[T]ribes usually do not have jurisdiction over non-Indians for activities off the reservation or Indian-fee land"), *cert. denied*, 537 U.S. 818 (2002); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180 (2d Cir.

contrast, tribal status is not a prerequisite to tribal jurisdiction over an individual domiciled outside of Indian country. App.17a.

Similarly, in *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002), the North Dakota Supreme Court concluded that, where two parents of *different* tribes both lived outside their respective reservations at all times relevant to a paternity dispute, "the existence of any tribal court jurisdiction, much less exclusive tribal court jurisdiction, is questionable." *Id.* at 576 (quoting William C. Canby, Jr., *American Indian Law In A Nutshell*, 194-95 (1998) ("When the tribe or its member sues a nonmember for a claim arising outside of Indian country, tribal jurisdiction is more doubtful."); *see also In re Defender*, 435 N.W.2d 717, 721 n.4 (S.D. 1989) (in child custody dispute, tribal court had no subject matter jurisdiction over a nonmember parent who had conducted no activities on that tribe's reservation). But in the Ninth Circuit, the fact that a parent is a nonmember living off-reservation has no bearing *at all* on the existence of tribal court jurisdiction. App.17a.

Alaska's own courts have struggled for decades to determine whether or to what extent Alaska Native Villages have sovereign authority over child custody proceedings. *See, e.g., Native Vill. of Nenana v. State of Alaska, Dep't of Health & Social Servs.*, 722 P.2d 219, 221 (Alaska 1986) (concluding that tribes had *no* authority independent of the ICWA to initiate jurisdiction over child custody proceedings), *overruled*

1996) (recognizing that "tribal inherent sovereign powers ... do not extend to the activities of nonmembers of the tribe") (internal quotation omitted).

on other grounds by In re C.R.H., 29 P.3d 849 (Alaska 2001); *In re F.P.*, 843 P.2d 1214, 1216 (Alaska 1992) (rejecting Ninth Circuit's contrary view in *Venetie I.R.A. Council* that tribes had concurrent jurisdiction, and holding that "[n]othing in [*Venetie I.R.A. Council*] persuades us to change our opinion" in *Nenana*); *John v. Baker*, 982 P.2d 738, 743 (Alaska 1999) (holding that, in child custody dispute *outside* the ICWA's scope, tribes "possess the inherent sovereign power to adjudicate child custody disputes between tribal members in their own courts").[16]

The difficulty that the Alaska courts have had grappling with this important issue underscores the need for guidance from this Court.

C. The Conflict With The Intent Of Congress

The Ninth Circuit's decision also conflicts with the intent of Congress in the ICWA and, indeed,

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[16] The Alaska Executive Branch has also propounded opposite opinions on this question. *Cf. State v. Native Vill. of Tanana*, Alaska S. Ct. No. S-13332 (challenge to 2004 Op. Atty. Gen. Alas. No. 1, 2004 Alas. AG LEXIS 16 (Alaska AG 2004)) (formal Attorney General Opinion concluding that state courts have exclusive jurisdiction over child custody proceedings unless a tribe obtains case transfer under section 1911(b) of the ICWA or petitions for jurisdiction under section 1918); 2002 Informal Advice Memorandum from Donna Goldsmith, Assistant Attorney General to Jay Livey, Commissioner of Department of Health and Social Services Regarding *In re C.R.H.*, 29 P.3d 849 (Alaska 2001) (Alaska A.G. File No. 441-00-0006, Mar. 29, 2002) (informal client advice concluding that tribes have concurrent jurisdiction with the State in child custody proceedings covered by the ICWA) (reproduced in *Tanana*, Alaska S. Ct. No. S-13332, Tanana Excerpt of Record at Exc. 358-63).

significantly undermines the carefully calibrated scheme established by that Act for handling child custody disputes involving Indian children. As explained, the ICWA establishes guidelines for exercising jurisdiction over such disputes, which are grounded on whether an Indian child lives on the reservation. Indeed, the legislative history indicates that Section 1911(a) was intended to "confirm[] the developing Federal and State case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled *on the reservation*." H.R. Rep. No. 95-1386, at 21 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7544 (emphasis added). But Congress made equally clear that it did not intend "to oust the States of their traditional jurisdiction over Indian children falling within *their* geographic limits," *i.e.*, off the reservation. *Id.* at 19, *as reprinted in* 1978 U.S.C.C.A.N. at 7541 (emphasis added).

The Ninth Circuit rule fundamentally undermines that statutory scheme because it authorizes a tribe that lacks the land base necessary to invoke the "exclusive jurisdiction" provision in Section 1911(a) to *bypass* the "transfer" provision in Section 1911(b) and initiate a child custody proceeding *directly in tribal court*. That does three things (at least) that are directly at odds with the statute. First, it eliminates the checks that Congress imposed in Section 1911(b) before an action may be transferred to tribal court: the prior consent of the parents—which gives parents an "absolute veto power over transfers," Department of the Interior, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979)—and a judicial determination that there is not "good cause" to prevent a transfer to tribal court. Second, it strips parents of the important procedural

protections guaranteed by the ICWA. And third, it puts the onus on non-consenting parents or the State to seek to transfer the case *out* of tribal court, which is inconsistent with the statutory premise that an off-reservation case will at least begin in *state* court. *See* App.15a (reasoning that a party who objects to tribal court jurisdiction may "file a case in state court").

Nothing in this Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), is to the contrary. In that case, the Court held that twin babies born to members of a tribe were domiciled on the reservation for purposes of ICWA § 1911(a) by virtue of the fact that their parents lived on the reservation. *Id.* at 37, 48. In reaching that decision, this Court observed in dicta that ICWA § 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, *state-court proceedings* for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of 'good cause,' objection by either parent, or declination of jurisdiction by the tribal court." *Id.* at 36 (emphasis added). But neither that dictum nor Section 1911(b) itself *confers* any jurisdiction on tribes—concurrent or otherwise—beyond the authority to receive transfer cases from state courts in accordance with the "metes and bounds" set forth by Congress. *Lara*, 541 U.S. at 202.

Moreover, *Holyfield* could not have recognized any inherent tribal authority over nonmembers because both parents in that case were *tribal members* who lived *on* the reservation. 490 U.S. at 37. Likewise, the holding of the decision was that the Indian children (who were also members of the tribe) were domiciled on

the reservation as well. *Id.* at 48-49. Thus, nothing in *Holyfield* (or the ICWA) expands the inherent authority of tribes to initiate child custody proceedings involving a nonmember outside Indian country.[16]

The fact that the Ninth Circuit rule permits the hundreds of Indian tribes in Alaska to bypass the scheme carefully crafted by Congress in the ICWA after balancing the interests of children and parents, States, and tribes in Indian child custody proceedings weighs strongly in favor of granting certiorari.

III. THE ENORMOUS PRACTICAL IMPLICATIONS OF THE NINTH CIRCUIT RULE UNDERSCORE THE NEED FOR REVIEW

Ordinarily, the fact that a question is undeniably important and implicates a serious conflict of authority is sufficient to warrant the exercise of this Court's certiorari jurisdiction. *See* S. Ct. R. 10. In this case, however, several compelling practical considerations also counsel heavily in favor of certiorari.

1. *Race to initiate child custody proceedings.* By adopting a rule that permits tribes to circumvent the

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[16] Both the Ninth Circuit and the tribe have rested their far-reaching conception of tribal authority on the doctrine of *inherent* tribal sovereignty and not on any suggestion that the ICWA (or any other Act of Congress) actually *confers* such sovereignty. *See* App. 2a (concluding that the ICWA does not "*prevent*[] the Kaltag court from exercising [inherent] jurisdiction") (emphasis added); App. 57a (*Venetie I.R.A. Council*), Appellees' Br. 6 (9th Cir. Oct. 6, 2008) (arguing that Section 1911(b) "says absolutely nothing about a Tribe's original jurisdiction to hear child protection proceedings in the first instance"). But, as discussed, this conception of inherent tribal authority—one reaching off-reservation over nonmembers—is wholly unsupported by this Court's precedents.

ICWA's transfer provision and attendant checks (including the parental veto right) the decision below creates an enormous incentive for tribes to initiate child custody proceedings *before* a state court case is filed—thus triggering § 1911(b) and its checks on transfer. Once a child protection action is filed in tribal court, the tribe could exercise exclusive jurisdiction over the matter (as the tribe here did) and effectively strip the State of its *parens patriae* role in preserving and protecting the welfare of off-reservation Indian children. And since the ICWA does not grant States any right to intervene in tribal court proceedings (*cf.* 25 U.S.C. § 1911(c) (granting tribes the right to intervene in state court proceedings)), the State would lack a right to intervene to protect its interests—and, more to the point, the child's interests—in tribal court. Meanwhile, the State and nonmember parents in particular will be motivated to bring actions quickly in state court, in order to avoid this situation and secure the protections afforded by § 1911(b). Either way, the children stand to be the real losers—because the incentive to file first may cut short available efforts to resolve child custody matters *without* litigation.[17]

2. *Uncertain nature of tribal court proceedings.* The procedural protections afforded to parents in tribal courts may also be slight, particularly when compared

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[17] Where the child is born to parents of different tribes, there may even be a race *among* tribes to file first. Alaska is already aware of one such case to occur since the decision below, in which the Tribal Courts of Kaltag and Tanana both purported to assume jurisdiction and issue competing orders on the same day regarding custody over three children eligible for membership in both tribes—owing to their parents' membership in different villages.

to those required in state court proceedings subject to the ICWA. Indeed, in smaller villages, a tribe may even lack a court. By contrast, the ICWA guarantees indigent parents the right to court-appointed counsel in removal, placement, or termination proceedings. 25 U.S.C. § 1912(b). The ICWA also establishes important procedural safeguards on the termination of parental rights, including a "beyond a reasonable doubt" standard of proof. *See id.* § 1912(f). However, because the ICWA is intended "to establish minimum Federal standards and procedural safeguards in *State Indian child custody proceedings*," H.R. Rep. No. 95-1386, at 19, *as reprinted in* 1978 U.S.C.C.A.N. at 7541 (emphasis added), tribal courts need not—and often do not—provide those protections.[18]

Moreover, Alaska affords a number of additional procedural protections in child custody proceedings. First, Alaska's courts have long afforded even greater procedural protections to parents involved in child custody proceedings than is required by the federal Due Process Clause. *See, e.g.*, *In re K.L.J.*, 813 P.2d 276, 282 n.6 (Alaska 1991); *see also Flores v. Flores*, 698

[18] It is unclear what procedural protections were afforded to the parties in this case. For example, in discovery, when asked whether N.S.'s parents were given even "the ability to review the laws, codes, resolutions, and/or manuals concerning the operation of the Kaltag Tribal Court," respondents indicated only that "Kaltag tribal *members* have the ability to review "Tribal Court Development" and "Tribal Court Handbook." Kaltag Tribal Council and Hudson and Salina Sam's Responses and Objections to Defendants' Discovery Requests at 4 (D. Alaska Apr. 2, 2007) (emphasis added). Likewise, the Kaltag Constitution makes no provision for the procedures to be followed in Kaltag Tribal Court, or, for that matter, even the existence of the court. App. 79a-85a.

P.2d 893, 893-94 (Alaska 1979). Even Alaska Natives who voluntarily relinquish parental rights are "entitled to the appointment of an attorney if a hearing is requested ... to the same extent as if the parent's rights had not been terminated," in order to modify termination orders or even to reinstate parental rights. Alaska Stat. § 47.10.089(i). Likewise, courts may appoint attorneys to represent children's interests in custody hearings. *Id.* § 47.10.010(b). Tribes, meanwhile, are expressly provided notice of and the opportunity to challenge non-emergency transfers of child placement. *id.* § 47.10.030(s). And importantly, Alaska affords both children and their parents the right to appeal a judgment or order, *id.* § 47.10.080(i), something that Native Villages typically do not or as a practical matter cannot make available.[19]

3 *Geographic burdens for nonmembers.* Because tribal jurisdiction has no connection to the existence of a land base under the Ninth Circuit rule, the decision below also may impose hardships for parents who do

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[19] At least one study has raised questions about the evenhandedness of child custody proceedings in certain tribal courts in Alaska. *See* Lisa Rieger & Randy Kandel, *Child Welfare and Alaska Native Tribe Governance: A Pilot Project in Kake, Alaska*, at 3-4 (Oct. 1999) (noting that "not everyone ... was happy with the handling of cases and their consequences—in a community where everyone knows or thinks they know, who did what [t]o whom.... [M]embers of powerful families ... got off lightly [while] others—persons with bad reputations or members of families without political clout, are unjustly targeted"); *see also Nenana*, 722 P.2d at 222 (observing that "[s]ome of the [200-plus tribes in Alaska] already may have systems for dispute resolution in place capable of adjudicating custody matters in a reasonable and competent fashion; others, no doubt, do not").

not live in the vicinity of the tribal court initiating the proceeding. For example, under the Ninth Circuit rule, the Village of Kaltag could initiate Indian child custody proceedings involving a child or parent living more than 1000 miles away in Ketchikan. Indeed, given the immense size of Alaska and the fact that Native Villages are often separated by significant—often difficult-to-travel—distances, it may not be logistically or financially feasible for nonmember parents to attend such proceedings in person. And because a tribe may assume jurisdiction without a nonmember having ever set foot in the village—or Alaska, for that matter—a nonmember parent who lives outside the village exercising jurisdiction may be at a significant practical disadvantage. At least when the action is filed in the state courts—which are more accessible than many if not most tribal courts—a nonmember parent may object to a transfer to tribal court. 25 U.S.C. § 1911(b).

4. *Follow-on litigation over tribal court decrees.* As this case illustrates, the Ninth Circuit rule also will engender follow-on litigation over the validity of tribal court decrees. Because it is likely that nonmember parents who are dissatisfied with tribal court proceedings will choose to challenge the legitimacy of the tribal court's judgment, the decision below is likely to generate follow-on litigation in state and federal court over whether individual Native Village tribal court judgments are entitled to full faith and credit. Such litigation—which, for example, might focus on the adequacy of the procedures followed in tribal court—not only will generate friction between state and tribal courts, but could jeopardize the welfare of children by prolonging child custody disputes and undermine one of

the overriding purposes for passing the ICWA in the first place. *See* 25 U.S.C. § 1901(5).

5. *Spill over into new areas.* The Ninth Circuit's decision may invite new and even more expansive exercises of tribal authority. If—as the courts below held—"internal disputes of tribal members," App.17a, encompass any situation merely *involving* a tribal member, tribal jurisdiction could extend to nonmembers in cases such as inheritance, divorce, and child custody. Because the exercise of jurisdiction over the nonmembers in this case was also off-reservation, an element of geographic uncertainty exists. There is no reason for this Court to permit such a potentially destabilizing decision to stand—especially where it is flatly at odds with this Court's own precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

FILED
AUG 28 2009
MOLLY C. DWYER,
CLERK
U.S. COURT OF
APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KALTAG TRIBAL COUNCIL; HUDSON SAM; SALINA SAM, Plaintiffs – Appellees, v. KARLEEN JACKSON, in her official capacity as Commissioner of Alaska Department of Health and Social Services; BILL HOGAN, in his official capacity as Deputy Commissioner of Alaska Department of Health and Social Services; and PHILLIP MITCHELL, in his official capacity as Section Chief of the Alaska Bureau of Vital Statistics, Defendants – Appellants.	No. 08-35343 D.C. No. CV-06-211-TMB MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court for the District Court of Alaska

Timothy M. Burgess, District Judge, Presiding
Argued and Submitted August 5, 2009
Anchorage, Alaska

Before: FARRIS, THOMPSON and RAWLINSON, Circuit Judges.

Plaintiffs-Appellees Kaltag Tribal Council ("Kaltag"), Selina Sam and Hudson Sam (collectively, "Kaltag plaintiffs") filed this case in district court against Karleen Jackson, Bill Hogan, and Phillip Mitchell, employees of the State of Alaska, Department of Health and Human Services. The Kaltag plaintiffs alleged that an adoption judgment issued by the Kaltag court is entitled to full faith and credit under § 1911(d) of the Indian Child Welfare Act ("ICWA"), and that the Alaska employees were required to grant the request for a new birth certificate. The district court granted the Kaltag plaintiffs' motion for summary judgment and denied the Alaska employees' summary judgment motion. The Alaska employees appeal. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

The district court's decision that full faith and credit be given to the Kaltag court's adoption judgment is compelled by this circuit's binding precedent. *See Native Village of Venetie IRA Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991). The district court correctly found that neither the ICWA nor Public Law 280 prevented the Kaltag court from exercising jurisdiction. Reservation status is not a requirement of jurisdiction because "[a] Tribe's authority over its reservation or Indian country is incidental to its

authority over its members." *Venetie*, 944 F.2d at 559 n.12 (citations omitted).

The Eleventh Amendment does not bar the relief sought by the Kaltag plaintiffs. *Id.* at 552.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KALTAG TRIBAL COUNCIL, and HUDSON AND SALINA SAM, Plaintiff, vs. KARLEEN JACKSON, et al., Defendants	Case No. 3:06-cv-211 TMB ORDER

I. MOTIONS PRESENTED

Plaintiff seeks summary judgment on all counts in the Amended Complaint. Defendants move for summary judgment of dismissal on all counts. Both motions have been fully briefed, and the Court heard oral argument on February 13, 2007. The Court being fully advised, now enters the following order.

II. BACKGROUND

N.S. was born on October 18, 1999. Her birth mother is a member of the Kaltag Tribe, a federally recognized tribe as defined by the Indian Child Welfare Act, ("ICWA").[1] Her birth father is from the Native Village of Koyukuk and is either a tribal member of Koyukuk or eligible for membership in that Tribe. N.S. is therefore an "Indian child" as defined in the Act.[2]

On September 3, 2000, a "Tribal Family Youth Specialist" ("Kaltag TFYS worker"), who is an employee of Plaintiff Kaltag Tribal Council ("Kaltag"),

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[1] 25 U.S.C. § 1903(8).

[2] 25 U.S.C. § 1903(4).

took emergency custody of N.S. due to her mother's inability to care for N.S. and a likelihood of physical injury. On September 6, 2000, the Kaltag court took temporary custody of N.S., and N.S. continued in the temporary custody of Kaltag court until July 29, 2004, when the Kaltag court terminated the parental rights of both parents, made N.S. a ward of the court, and granted permanent guardianship to Plaintiffs Hudson and Selina Sam, who had been N.S.'s foster parents since her placement with them on April 27, 2004.

In August of 2006, the Sams petitioned the Huslia Tribal Court to adopt N. S. and make her a permanent part of their family. Because N.S. is a member of the Kaltag Tribe, and the Kaltag Tribal Court had already exercised jurisdiction over N.S., the petition was forwarded to the Kaltag Tribal Court, which issued an Order of Adoption on November 17, 2006, declaring the Sams to be N.S.'s legal parents. In the same order, the tribal court ordered that N.S.'s name be changed to reflect that of her new parents, and that this name change shall be reflected on a new birth certificate from the State of Alaska, Bureau of Vital Statistics. The same day that the Order of Adoption was signed, the clerk of Kaltag Tribal Court signed and submitted a Report of Adoption to the Bureau of Vital Statistics requesting a new birth certificate for N.S.

On January 26, 2006, the Department of Health and Social Services, Bureau of Vital Statistics rejected the request. In a letter to the Kaltag Tribal Council, the Bureau explained:

> As of October 25, 2006, the Bureau will only be accepting Tribal Court granted adoption paperwork from the following 3 entities: Barrow, Chevak, and Metlakatla. All other

> tribal entities will need to submit the Cultural Adoption packet in order for the Bureau to process the adoption.

The letter also stated that a Cultural Adoption packet was enclosed with the letter, and explained that once it was completed and returned, along with some other missing information, the Bureau would continue processing the request.[3] The Bureau never received a completed Cultural Adoption packet from Kaltag regarding N.S.

The Kaltag Tribal Council and the Sams filed this case on September 8, 2006, alleging that adoption orders issued by the Kaltag court are entitled to full faith and credit under Subsection 1911(d) of the ICWA, and that the Bureau of Vital Statistics violated the subsection by not granting the request for an amended birth certificate. Plaintiffs seek a declaration that Kaltag court's adoption orders are entitled to full faith and credit, and an injunction requiring the Bureau to grant said status to the adoption order by issuing the Sams a substitute birth certificate.

III. STANDARD OF REVIEW

Summary judgment is appropriate where there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Where the material facts are not in dispute, the issue is one of law for the court and

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[3] According to the Defendants, copies of denial letters such as the one sent to the Kaltag Tribal Council are not retained by the State once a cultural adoption application is received, which makes it difficult to determine how many "cultural adoptions" approved by the State were the result of the State's refusal to accept a tribal court adoption decree.

summary judgment is therefore appropriate. The parties here agree that there are no factual disputes.

IV. DISCUSSION

Plaintiffs' motion for summary judgment requests a declaration that federally recognized tribes in Alaska possess concurrent jurisdiction with the State to adjudicate adoptions of their own tribal members, and that the State must therefore give full faith and credit to tribal adoption orders pursuant to § 1911(d) of the ICWA. In addition, the motion seeks a declaration that, since the tribal adoption decree of N. S. is entitled to full faith and credit under § 1911(d) of the ICWA, the Sams, as the adoptive parents, are entitled to have N.S.'s adoption order recognized and an amended birth certificate issued pursuant to 42 U.S.C. § 1983.

Defendants' Motion for Summary Judgment seeks dismissal of all counts of the complaint, arguing that the case is barred by the Eleventh Amendment of the United States Constitution, and alternatively that Kaltag does not have the authority to initiate child protection proceedings in tribal court in Alaska.

The Eleventh Amendment

Defendants, all employees of the State of Alaska, ask this Court to dismiss the action because the Plaintiffs are prohibited from bringing this lawsuit by the Eleventh Amendment of the United States Constitution, which provides that a state is immune from suit regarding claims for which it has not consented to be sued.

Eleventh Amendment immunity protects Alaska and its officials from suits except for "certain suits seeking declaratory and injunctive relief against state

officers in their individual capacities."[4] This limitation of sovereign immunity is known as the *Ex parte Young* doctrine.[5] Defendants argue that although the *Ex Parte Young* exception allows state officials to be sued for declaratory and injunctive relief, that exception is not available here because of the impact the suit has on the state's "special sovereign interests." Defendants argue that a state forum is available here, and that any federal interest in interpreting the ICWA is outweighed by the state's sovereignty interests implicated by this case.[6] Accordingly, argue Defendants, the Court should decline to apply the *Ex parte Young* exception to state sovereign immunity, and should dismiss the Complaint.

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[4] *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) ("The Tribe's suit, accordingly, is barred by Idaho's Eleventh Amendment immunity unless it falls within the exception this Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. *See Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).")

[5] *Edelman v Jordan*, 415 U.S. 651 (1974).

[6] Specifically, Defendants complain that granting the requested relief (declaration and injunction) would eliminate the state's exclusive jurisdiction, as set out in Section 1911 of the Act, to initiate child protection proceedings concerning Indian children of tribes, such as Kaltag, that are not on reservations or have not applied for exclusive jurisdiction. If, as the Plaintiffs claim, the state has to give full faith and credit to Kaltag's adoption orders arising from child protection proceedings that were initiated by Kaltag and not transferred from a state court proceeding, it would completely strip the state and its courts of its sovereign right to adjudicate matters concerning the birth family of the adopted child, since the state has no ability to intervene or transfer the action back to state court.

The Ninth Circuit held in *Native Village of Venetie I R A Council v. State of Alaska*,[7] ("*Venetie*"):

> [W]e agree with the district court—and Alaska does not seriously challenge this holding—that the eleventh amendment does not bar the plaintiffs' request for injunctive relief against the Commissioner of the Department of Health and Human Services.
>
> ... [D]eclaratory relief is not available if its sole efficacy would be as res judicata in a subsequent state court action for retroactive damages or restitution. However, such is not the case here. Not only has Alaska refused to recognize the native village tribal adoptions in the past, it continues to do so in the present, and will apparently continue to refuse recognition in the future. Thus, if this refusal is ultimately determined to be unlawful, the grant of declaratory relief can most properly be described as a mere case-management device that is ancillary to a judgment awarding valid prospective relief. The plaintiffs' request for declaratory relief is not barred by the eleventh amendment.[8]

Although Defendants argue that the *Venetie* case is not on point, it does provide guidance on this issue. The Eleventh Amendment bars any claims for retroactive relief.[9] It does not bar a request for injunctive relief against the Commissioner of the

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[7] 944 F.2d 548 (9th Cir. 1991).

[8] *Id.* at 552 (citations omitted).

[9] *Venetie*, 944 F.2d at 552.

Department of Health and Social Services.[10] If the Court determines that Defendants, as individuals, have violated federal law, injunctive relief would be appropriate. Regarding declaratory relief, the *Venetie* court noted that such relief "is not available if its sole efficacy would be as res judicata in a subsequent state court action for retroactive damages or restitution."[11] There is no indication that such is the case here. The only relief sought by Plaintiffs is a declaration that Kaltag court's adoption orders are entitled to full faith and credit, and an injunction requiring the Bureau to grant said status to the adoption order in this case by issuing the Sams a substitute birth certificate. No damages or restitution are sought.

Furthermore, the *Venetie* court specifically found that Congress intended to give Indian tribes access to federal courts to determine their rights and obligations under the ICWA.[12] "The Act includes an express congressional finding that state courts and agencies have often acted contrary to the interests of Indian tribes .... It would thus be ironic indeed if Congress then permitted only state courts, never believed by Congress to be the historical defenders of tribal interests, to determine the scope of tribal authority under the Act."[13] The Court finds that the Eleventh Amendment does not bar this suit.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 653

[13] *Id.* at 653-54, citing 25 U.S.C. § 1901(5)(1989)

The Indian Child Welfare Act ("ICWA")

It is undisputed that the state of Alaska must give full faith and credit to child custody determinations made by the tribal courts, if the tribal court properly exercised jurisdiction in the matter. The issue here is whether the tribal court had concurrent jurisdiction with the State to initiate a child protection matter.[14] Defendant argues that allowing tribes to initiate CINA-type cases outside of reservations and Indian country discounts the distinct differences in the parties' interests in such cases, and would radically recast the state/tribal jurisdictional balance already struck by Congress in their enactment of the ICWA. Plaintiffs argue that concurrent jurisdiction is intended and required under the ICWA. The portion of the ICWA pertaining to child custody proceedings reads as follows:

> **Indian tribe jurisdiction over Indian child custody proceedings**
>
> **(a) Exclusive jurisdiction**
>
> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

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[14] Also referred to by the parties as "Child in Need of Aid" or "CINA-type" cases.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.[15]

A "child custody proceeding" includes foster care placement, termination of parental rights, preadoptive

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[15] 25 U.S.C. § 1911

placement, and adoptive placement.[16] The ICWA includes Alaska natives within its definition of "Indians," and Alaska native villages are "Indian tribes" within the meaning of the Act.[17] Only one tribe in Alaska, the Metlakatla Indian Community, occupies a reservation, so the jurisdictional provision of § 1911(a) related to domicile is not applicable to the Kaltag tribe.

According to the plain language of the ICWA, a tribe shall have exclusive jurisdiction over child custody proceedings (foster care placement, termination of parental rights, preadoptive placement, and adoptive placement) where the child is living within the reservation, or where a child living outside of the reservation is a ward of the tribal court.[18] In contrast, a state court, handling a proceeding for the foster care placement of, or termination of parental rights to, an Indian child *not* domiciled or residing within the reservation of the Indian child's tribe, is required to transfer such proceeding to the jurisdiction of the tribe, in the absence of good cause to the contrary.[19]

In the plain language of § 1911, there is a grey area, which is the crux of this case: When a child is *not* domiciled or residing within a reservation, must the state court initiate child custody/protection proceedings or can such a proceeding originate in the tribal court? Plaintiffs suggest that the implication of

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[16] 25 U.S.C. § 1903

[17] 25 U.S.C. §§ 1903(3) & (8)

[18] § 1911(a)

[19] § 1911(b)

§ 1911 is that the tribal court has concurrent jurisdiction with the state court where an Indian child is not domiciled or residing on Indian land. Defendants' position is that tribes have only *transfer* jurisdiction in these circumstances, and that any case involving a child domiciled outside of Indian country must originate in state court, and be transferred to tribal court.

The United States Supreme Court has held that § 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation ..."[20] The parties disagree as to the meaning of "concurrent jurisdiction." Defendants allege that concurrent jurisdiction does not mean that Alaska Native villages have "concurrent authority" to *initiate* child protection cases, but rather that the transfer jurisdiction is a concurrent jurisdiction *conditioned upon* parental consent and the absence of *good* cause to deny transfer. To find otherwise, argue Defendants, would cut off the state's ability to protect its interest in child welfare, and would make the veto power that parents have with respect to transfer to tribal courts meaningless. Defendants further argue that legislative history suggests that Congress intended to limit tribal authority under § 1911(b) to transfer only concurrent jurisdiction.

The Court finds Defendants' interpretation of § 1911(b) strained, in light of the United States Supreme Court's language in *Holyfield*. It would be incongruent for this Court to find that "presumptively tribal jurisdiction" requires the Tribe to first defer

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[20] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989)

jurisdiction to the state court, and then wait for the state court to transfer the matter to tribal court.

Defendants also argue that the state's interest in protecting minor Alaska Native citizens would be entirely cut off if the tribal court could take jurisdiction first, and the interests of non-Native or non-member parents could be impaired by having to appear in a tribal court without the opportunity to object to that court. However, as Plaintiff explained at oral argument, any party that finds itself in tribal court against its wishes is always free to object to the tribal jurisdiction, call a state CINA officer, or file a case in state court.[21] Alaska state courts retain concurrent jurisdiction over all disputes arising within the State of Alaska, whether tribal or not.[22] "The only bar to state jurisdiction over Indians and Indian affairs is the presence of Indian country."[23]

Voluntary vs. Involuntary Child Custody Proceedings

Plaintiffs' position is that the substantive issues in this case already have been decided by the Ninth Circuit in *Venetie*. There, the Ninth Circuit addressed the issue "whether federal law requires the state of Alaska to accord 'full faith and credit' to child custody determinations made by the tribal courts of native villages,"[24] and concluded that it does so require.

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[21] Indeed, in this case the state CINA office was notified; however, what resulted from that notification is unclear.

[22] *John v. Baker*, 982 P.2d 738, 759 (Alaska 1999).

[23] *Id.*, citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

[24] *Venetie*, 844 F.2d at 550.

Defendants argue that the holding of *Venetie* should be limited to the facts in that case, and that the doctrine of collateral estoppel is not applicable because of the factual differences between the *Venetie* and the current case. Defendants distinguish *Venetie* arguing that it addressed strictly internal relations, such as a voluntary adoption among tribal members. The adoption in this case is not private nor voluntary, nor among members, nor did it originate as an adoption case.[25] Noting that one quarter of rural Alaskans do not have convenient access to state courts, Plaintiffs argue that drawing any line that would prevent Tribes from exercising jurisdiction over CINA-type cases would prevent them from assisting children when they are most at risk. Tribes closest to the situation in all of rural Alaska would be powerless to help children in their own villages at the most critical time.

Defendants' voluntary versus involuntary argument has previously been rejected by the Ninth Circuit. In *Doe v. Mann*, the Plaintiff's efforts to create a distinction between "involuntary" and "voluntary" proceedings in order to put her case outside of California's Public Law 280 jurisdiction were found unpersuasive and without statutory support.[26] The court examined the definition of "child custody proceeding" in the ICWA and concluded that it "definitely encompasses voluntary and involuntary

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[25] Alternatively, Defendants argue that this case involves unraised questions of law that should be reconsidered in light of legal developments since the *Venetie* decision. However, this Court is in no position to "reconsider" a valid Ninth Circuit decision.

[26] *Doe v. Mann*, 415 F.3d 1038, 1062 (9th Cir. 2005).

proceedings."[27] Ultimately the Court held that imposing a "dividing line between voluntary and involuntary finds no support in the statute."[28]

Tribal Membership

Defendants note that the Alaska Supreme Court has held that a "tribe only has subject matter jurisdiction over the internal disputes of *tribal members*."[29] Similarly, in *Venetie*, the Ninth Circuit noted in a footnote that "[a] tribe's authority over its reservation or Indian country is incidental to its authority over its members."[30] However, it is the membership of the child that is controlling, not the membership of the individual parents. "A tribe's inherent sovereignty to adjudicate internal domestic custody matters depends on the membership or eligibility for membership of the child. Such a focus on the tribal affiliation of the children is consistent with federal statutes such as the ICWA, which focuses on the child's tribal membership as a determining factor in allotting jurisdiction. Because the tribe only has subject matter jurisdiction over the internal disputes of tribal members, it has the authority to determine custody only of children who are members or eligible for membership."[31]

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[27] *Id.* The court found particularly persuasive the phrase "where the parent or Indian custodian cannot have the child returned upon demand," as evidence of the fact that the ICWA covers both voluntary and involuntary proceedings.

[28] *Id.* at 1064.

[29] *John*, 982 P.2d at 759.

[30] *Venetie*, 944 F.2d at 559 n. 2 (citation omitted).

[31] See *John*, 982 P.2d at 759-60 (internal footnote omitted).

Public Law 280 and 25 U.S.C. § 1918

The State's policy that it need not grant full faith and credit to Kaltag's Tribal Adoption Order has been justified by an October 2004 Attorney General opinion, which concluded that because Alaska is a Public Law 280 state, the State has exclusive jurisdiction over adoption proceedings and therefore Alaska Tribes must petition pursuant to 25 U.S.C. § 1918 to reassume jurisdiction. Defendants argue that since most Alaska Native villages lack a reservation, they cannot exercise § 1911(a) jurisdiction over child protection cases, and therefore all tribes must petition for jurisdiction under § 1918 of the ICWA.[32] In response, Plaintiffs argue that § 1918 is applicable only where tribes wish to have exclusive, rather than concurrent, jurisdiction over child custody proceedings. Plaintiffs are correct. In *Doe v. Mann*, the Ninth Circuit found that § 1918 was a mechanism provided by Congress to allow tribes in Public Law 280 states the opportunity to obtain *exclusive* jurisdiction over child custody proceedings.[33] The implication is that the tribes and the states otherwise shared concurrent jurisdiction.

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[32] 25 U.S.C. § 1918 reads in relevant part:

> "Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction."

[33] *Mann*, 416 F.3d at 1061-62.

In any event, despite the distinctions made by Defendants between the *Venetie* facts and the facts of this matter, the law remains the same: "resolving the jurisdictional ambiguities in favor of the villages, we hold that neither the Indian Child Welfare Act nor Public Law 280 prevents [the villages] from exercising concurrent jurisdiction [over their members' domestic relations]."[34]

V. CONCLUSION

While the Court is sensitive to the concerns expressed by the Defendants that the state will not be able to track child protection issues of Native children where a tribal court takes jurisdiction before the state does, the cases cited herein clearly control the outcome of this dispute. Furthermore, any grey area identified in § 1911 must be resolved in favor of the Tribe, as ambiguities are to be resolved to the benefit of Indians.[35] "[W]hen a question of tribal power arises, the relevant inquiry is whether any limitation exists to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act."[36]

Accordingly, Plaintiff's Motion for Summary Judgment at Docket 29 is GRANTED. Defendants' Motion for Summary Judgment at Docket 31 is DENIED. The Kaltag court's adoption orders are entitled to full faith and credit, and the Bureau shall grant said status to the adoption order by issuing the Sams a substitute birth certificate.

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[34] *Venetie*, 944 F.2d at 662.

[35] *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1986).

[36] *Venetie*, 944 F.2d at 666 (citing W. Canby, *American Indian Law* 71-72 (2d ed. 1988)).

Dated at Anchorage, Alaska, this 22nd day of February, 2008.

/s/ Timothy Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

KALTAG TRIBAL COURT
KALTAG, ALASKA

In the Matter of:	)
	)
N[redacted] S[redacted]	)
DOB 10/18/99	) Case No. 00-0611
	)
	) Tribal Court Phone
	) Number:
Minor Tribal Member	) (907) 534 2264

ORDER OF ADOPTION

This matter came before the Kaltag Tribal Court for hearing on October 14, 2005. Present at the hearing were Kaltag Tribal Court Judges Beverly Madros, Fred Alexie, Dawn Madros, and TFYS Eleanor Maillelle, and present telephonically was Hudson Sam and Selina Sam, Guardians of the child. Also present telephonically were Tanana Chiefs Conference (TCC) Social Worker, Marie Grant, and the TCC Tribal Court Facilitator, Sue Hollingsworth.

The Court **HEREBY FINDS**:

1. Hudson and Selina Sam, guardians, petitioned the Court for the adoption of N[redacted] S[redacted], and
2. Parental rights of the natural parents of the minor were terminated on July 29, 2004, and permanent legal guardianship was given to Hudson and Selina Sam; and
3. The adoption of the child is in the best interest of the child; and

4. The adoption of the child is in accord with the traditional and customary law of the Kaltag Tribe.

NOW THEREFORE BE IT ORDERED BY THE KALTAG TRIBAL COURT THAT:

1. The child shall be the child of Hudson Sam and Selina Sam (nee' Selina Anne Simon) for all legal purposes from this time forward, and
2. The child's name shall be N[redacted] Sam from this time forth and shall be reflected on the new birth certificate issued by the State of Alaska Bureau of Vital Statistics; and
3. The child shall the right to inherit from her natural parents unless they otherwise provide; and
4. A new birth certificate shall be requested of the State of Alaska reflecting this adoption.

DONE BY TRIBAL COURT ACTION THIS 14th DAY OF OCTOBER 2005.

s/ Fred W. Alexie
Presiding Tribal Court Judge

11/17/05
Date

ATTEST: s/ Eleanor Mailelle
Clerk

KALTAG TRIBAL COURT
KALTAG, ALASKA

In the Matter of:	)	
	)	
N[redacted] S[redacted]	)	
DOB 10/18/99	)	Case No. 00-0611
	)	
	)	Tribal Court Phone
	)	Number:
Minor Tribal Member(s)	)	(907) 534-2243

ORDER GRANTING PERMANENT GUARDIANSHIP

The Kaltag Tribal Court held a hearing on July 29, 2004 at 10:30 a.m. Present at the hearing were judges, Marion Esmailka, Madeline Solomon and Violet Burnham. Present at the hearing were C[redacted] S[redacted], mother. Hudson and Selina Sam, foster parents. Also present at the hearing was TFYS, Donna Esmailka. Present telephonically in Fairbanks was Sue Hollingsworth, TCC Tribal Court Facilitator and Mishal Gaede, Child Protection Coordinator. After considering all the evidence available, this Tribal Court finds that the welfare of the child, N[redacted] S[redacted], is endangered if temporary legal custody is not taken by the tribal court.

The Tribal Court HEREBY FINDS:

5. The mother of the child, C[redacted] S[redacted], is a Kaltag tribal member. Under the tribal constitution of Kaltag this child is a Kaltag tribal member under the jurisdiction of the Tribal Court and eligible to apply for enrollment, and

6 The mother of the child, C[redacted] S[redacted], was given written notice of this hearing and was present at this hearing. She got off the teleconference for awhile because she could not hear anything. Sue Hollingsworth called her back. She stated she did not know where her daughter was placed. She did not know she went back to Hualia. She said she had called the Tribal office several times and someone just hangs up on her; and

7 The father of this child, A[redacted] L[redacted], was given written and verbal notice of this hearing and was not present at this hearing; and

8 The foster parents of this child, Hudson and Selina Sam were given written notice of this hearing and was present at this hearing. The family has some issues but they want to keep her permanently. In their cultural belief they do not adopt children, they keep them until they are of age and then the child decides what path they want to go. Hudson's mom and dad raised a lot of children without adopting any of them. They let them keep their own birth name and belief. That is what they want with N[redacted], permanent guardianship. We love her and want to keep her, please consider their cultural belief. H[redacted] is very relaxed and comfortable with them. She calls them mom and dad, sometimes when around the grandchildren she calls them grandma and grandpa. She fits right into the family. She gets along with the community people likes to talk and she talks lots. She is not wetting the bed as much as she did before. She got sick one time, she had a urinary tract

infection. She brings joy into their life. She shares a room with their youngest daughter, Barbie. Question? How does she act in a structured environment? They enrolled her in the Head Start program when she first went to Husha. She really enjoyed going to school. She was pulling hair at first but they sat down and talked to her and she stopped. She goes to church when they get up early enough, she does good. They all love her, their whole family. Question/concern; The court assumed they wanted to adopt her? They didn't want to keep moving from home to home, it's to hard on her. Hudson said "we want her but its our cultural belief not to adopt children", and

9 Sue Hollingsworth, Tribal Court Facilitator, gave a brief description of the Adoption and Family Safety Act. She also explained to the court about guardianship and adoption options; and

10 Donna Esmailka, TFYS gave a brief report on the case. She looked into family contacts for permanency. The parents were supposed to give a list of potential placements. In previous hearings C[redacted] gave some family names. They were contacted but could not make a commitment. Donna called A[redacted] I[redacted] get a list of names from his side but he did not want his family involved and there was no TFYS in Koyukuk at the time. Donna spoke with A[redacted] the morning of the hearing, July 29, 2004, and he that he could not make it to the hearing. When asked if he had any suggestions to the permanent planning, he said no. At this

hearing the court will determine whether or not parental rights will be terminated and to move forward with the permanent planning.

The Tribal Court CONCLUDES:

11. This child is a child in need of aid and should be granted permanent guardianship; and

12. It is in the best interest of the child to place her in permanent subsidized guardianship with Hudson and Selina Sam; and

13. It is in the best interest of the child to terminate the parental rights of her parents, A[redacted] L[redacted] and G[redacted] S[redacted]; and

14. It is in the best interest of the child for the TFYS, Donna Esmailka, and the TCC Social Worker, Mishal Gaede, to secure funds for her if applicable.

The Tribal Court THEREFORE ORDERS:

15. The Kaltag Tribal Court takes temporary legal custody of the child, N[redacted] S[redacted] and makes her a ward of this court; and

16. The Tribal Court hereby terminates the parental rights of A[redacted] L[redacted] and G[redacted] S[redacted] and

17. The permanent guardianship of the child is granted to Hudson and Selina Sam with a subsidy for her financial care until N[redacted] S[redacted]'s eighteenth birthday or until she graduates from High School, during which time they shall exercise full powers of guardianship to make legal, financial, health and educational decisions for her.

DONE BY TRIBAL COURT ACTION THIS 29th DAY OF JULY, 2004.

s/ Violet Burnham
Presiding Judge

KALTAG TRIBAL COURT
KALTAG, ALASKA

In the Matter of:	)	
	)	
N[redacted] S[redacted]	)	
DOB 10/18/99	)	Case No. 00-0611
	)	
	)	Tribal Court Phone
	)	Number:
Minor Tribal Member(s)	)	(907) 534-2243

ORDER AMENDING TEMPORARY CUSTODY

The Kaltag Tribal Council, exercising its authority as a tribal court, held a review in this case and amended the Order Granting Temporary Custody dated March 22, 2004 as follows:

The Tribal Court THEREFORE ORDERS:

18 The Kaltag Tribal Court takes temporary custody of the child, N[redacted] S[redacted], and makes her a ward of this court; and

19 The physical custody of the child is temporarily granted to Hudson and Selina Sam in Huslia Alaska

All other condition set forth within the Orders dated August 21, 2003 shall remain valid and in full effect until the next scheduled hearing.

s/ Madeline Solomon
Presiding Judge

4-22-04
Date

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF VENETIE I.R.A. COUNCIL; Native Village of Fort Yukon I.R.A. Council; Nancy Joseph; Margaret Solomon, Plaintiffs-Appellants,

v.

STATE OF ALASKA; Myra Munson, in her official capacity as Commissioner of the Department of Health and Social Services, Defendants-Appellees.

No. 88-3929.

Argued and Submitted Aug. 9, 1989.
Submission Vacated Aug. 10, 1989.
Resubmitted May 8, 1990.
Opinion Nov. 6, 1990.
Opinion Withdrawn Sept. 12, 1991.
Decided Sept. 12, 1991.

944 F.2d 548

Appeal from the United States District Court for the District of Alaska.

Before O'SCANNLAIN, LEAVY and TROTT, Circuit Judges.

ORDER

The opinion reported at 918 F.2d 797 (9th Cir.1990) is hereby withdrawn, and the attached opinion filed in

its stead. With this amended opinion, the plaintiffs-appellants' petition for rehearing is denied.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether federal law requires the state of Alaska to accord "full faith and credit" to child-custody determinations made by the tribal courts of native villages.

I

The native villages of Venetie and Fort Yukon lie on or above the Arctic Circle in Alaska's frozen tundra. Venetie has a population of 132, according to the 1980 census, all but three of whom are native. Five hundred and eighty-six people reside in Fort Yukon; 442 are native.

The native villages are organized under the Indian Reorganization Act ("I.R.A."). *See* 25 U.S.C. § 476 (1988). The villages' I.R.A. councils, two of the plaintiffs in this action, are the duly organized and elected governing bodies of the native villages.

Plaintiff Margaret Solomon is an Athabascan Indian from the Native Village of Fort Yukon. In the fall of 1985, Solomon was asked whether she would adopt a child born on September 28, 1985. She went to Fairbanks to pick up the infant, then eight days old. On May 27, 1986, the tribal court of the Native Village of Fort Yukon purported to formalize the adoption. Subsequently, in October 1986, Alaska denied Solomon benefits under the Aid to Families with Dependent Children program. State welfare officials informed Solomon that the state would not recognize the purported adoption and that the child was therefore not eligible for AFDC benefits.

Nancy Joseph is also an Athabascan Indian from the Native Village of Fort Yukon. One of Joseph's relatives, an expectant mother, asked Joseph to adopt the baby following the child's birth. Joseph agreed, and took the child home from the hospital shortly after his birth on February 24, 1986.

As the child's natural mother was from Venetie, she consented to the adoption in the tribal court of the Native Village of Venetie. Joseph subsequently requested a substitute birth certificate showing her to be the child's mother. However, the Bureau of Vital Statistics of the state of Alaska denied the request, observing that the Bureau "does not give recognition to native or tribal council adoption orders at this time."[1]

In June 1986, Joseph was laid off her job at the University of Alaska. After she had exhausted her unemployment benefits, she applied for AFDC benefits. On October 20, 1986, the Division of Public Assistance denied Joseph's application, informing her that "the courts have not recognized the Tribal adoption of the child. You should reapply when you can prove that you are the mother of the child."[2]

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[1] Letter from Patricia A. Lee, Supervisor, Special Services Unit, Bureau of Vital Statistics, State of Alaska Department of Health and Social Services, to Michael J. Stancampiano, Bureau of Indian Affairs, June 19, 1986. *See Native Village of Venetie v. Alaska*, No. CV F86-76 AJK (D.Alaska), Complaint (Nov. 21, 1986), Exhibit 2. Subsequent references to the record are to this case name and number.

[2] Letter from Patricia Donovan, Division of Public Assistance, State of Alaska, to Nancy L. Joseph, Oct. 20, 1986. *See* Complaint (Nov. 21, 1986), Exhibit 6.

Ms. Joseph, Ms. Solomon, the Native Village of Venetie I.R.A. Council, and the Native Village of Fort Yukon I.R.A. Council brought this suit in the United States District Court for the District of Alaska. They sought to enjoin the state of Alaska and certain of its officials from refusing to recognize the tribal court adoptions.[3] The plaintiffs asserted that under the Indian Child Welfare Act of 1978 ("Act"), 25 U.S.C. §§ 1901-1963 (1988), Alaska was required to give full faith and credit to the native-village adoption decrees. *See id.* § 1911(d). Both the plaintiffs and defendants moved for summary judgment. In a thorough and comprehensive opinion, the district court dismissed the plaintiffs' claims. *See Native Village of Venetie I.R.A. Council v. State of Alaska*, 687 F.Supp. 1380 (D.Alaska 1988). This timely appeal followed.

II

We first consider whether the district court had jurisdiction to hear the plaintiffs' grievances.

A

Since our jurisdiction is limited, we must determine whether federal courts have been empowered to hear this controversy. We begin with the claims of the native village plaintiffs. Congress has granted to federal district courts "original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (1988). The parties do not disagree that the "matter in controversy" here arises under the federal Indian Child Welfare Act. Rather, it

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[3] The plaintiffs also sought declaratory relief.

is disputed whether the native villages are a "tribe or band" for purposes of this section.

We recently identified two factors which a court may consider to determine whether an Indian group is such a "tribe or band" with a "duly recognized" governing body within the meaning of section 1362. (1) whether the Indian group has a governing body approved by the Secretary of the Interior under regulations issued pursuant to 25 U.S.C. § 476, or (2) whether the Indian group is a group or village listed as a native village in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b)(1). *See Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1160 (9th Cir.1990), *rev'd on other grounds sub nom Blatchford v. Native Village of Noatak*, — U.S. —, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991). The native villages of Venetie and Fort Yukon satisfy both criteria. *See, e.g.*, 43 U.S.C. § 1610(b)(1) (1982). Accordingly, they properly invoked federal jurisdiction under section 1362.

As to the individual plaintiffs, Joseph and Solomon, the district court had jurisdiction over their claims under 28 U.S.C. § 1331. In *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir.1983), *cert. denied*, 467 U.S. 1214, 104 S.Ct. 2655, 81 L.Ed.2d 862 (1984), we held that an action which raised "the issue of tribal sovereign powers," even if raised by an individual rather than a tribe, was "a sufficient federal question ... upon which to base § 1331 jurisdiction." *Id.* at 1321. Joseph's and Solomon's claims, as well as those of the native villages, raise the issue of the inherent tribal sovereignty of the native villages. As such, the district court possessed jurisdiction over these claims under section 1331.

B

Alaska argues that the plaintiffs' suit is barred by the eleventh amendment. The plaintiffs' claims are barred by the eleventh amendment to the extent that retroactive relief is sought. *See Blatchford v. Native Village of Noatak*, — U.S. —, 111 S.Ct. 2578, 2586, 115 L.Ed.2d 686 (1991), *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 425, 88 L.Ed.2d 371 (1985). Nonetheless, we agree with the district court—and Alaska does not seriously challenge this holding—that the eleventh amendment does not bar the plaintiffs' request for injunctive relief against the Commissioner of the Department of Health and Social Services. *See Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Whether the plaintiffs' request for declaratory relief survive eleventh amendment scrutiny is less clear. In *Green v. Mansour*, the Supreme Court concluded that declaratory relief is impermissible where such relief would "have much the same effect as a full-fledged award of damages or restitution by the federal court," the very type of relief forbidden by the eleventh amendment. 474 U.S. at 73, 106 S.Ct. at 428. Put another way, declaratory relief is not available if its sole efficacy would be as res judicata in a subsequent state court action for retroactive damages or restitution. *Id.* at 72-73, 106 S.Ct. at 427-28. However, such is not the case here. Not only has Alaska refused to recognize the native village tribal court adoptions in the past, it continues to do so in the present, and will apparently continue to refuse recognition in the future. Thus, if this refusal is ultimately determined to be unlawful, the grant of declaratory relief can most properly be described as "a

mere case-management device that is ancillary to a judgment awarding valid prospective relief." *Id.* at 71, 106 S.Ct. at 427. The plaintiffs' request for declaratory relief is not barred by the eleventh amendment.

C

Alaska argues that the plaintiffs have not alleged any federal causes of action. Specifically, it urges that statutory "full faith and credit" clauses, such as that contained in the Indian Child Welfare Act, do not automatically give rise to a federal cause of action. Alaska does not specifically challenge plaintiffs' other causes of action. However, since the failure to state a federal cause of action necessarily implicates this court's subject-matter jurisdiction, *see Ellis v. Cassidy*, 625 F.2d 227, 229 (9th Cir.1980), we consider *nostra sponte* each alleged cause of action.

Again, we begin with the native villages' causes of action. The plaintiffs allege that the defendants' actions deprived the native villages of rights secured under the "federally-protected inherent right of self-governance." Complaint ¶ 17. In *Noatak*, we held that Noatak had properly invoked federal subject-matter jurisdiction by alleging that "the Commissioner [of the Department of Community and Regional Affairs of the State of Alaska] violated federal laws and policies intended to further tribal self-government." 896 F.2d at 1165; *see also Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1474-75 (9th Cir.1989) (Alaska native village's allegations of sovereign power, as a "matter of federal statute and 'reserved powers,'" was a cognizable question under federal common law). Therefore, the native villages have alleged a valid cause of action.

The villages may not be able to obtain the particular relief they desire under this cause of action, however, if Congress specifically intended that a federal cause of action not accrue under the Indian Child Welfare Act's full faith and credit clause. A specific congressional directive would trump the general rule. *Cf Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524, 109 S.Ct. 1981, 1992, 104 L.Ed.2d 557 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."). Thus, if Congress did not intend to permit tribes to sue in federal court to determine their rights under the Act's full faith and credit clause, such a restriction would prevent tribes from obtaining relief under the cause of action based on the right of self-governance.

As authority for its contention that no right of action exists under the Act's full faith and credit clause, Alaska cites the Supreme Court's recent decision in *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988). There the Court held that the full faith and credit clause of the Parental Kidnapping Prevention Act of 1980, *see* 28 U.S.C. § 1738A (1988), does not give rise to a cause of action in favor of the individual litigants in a custody dispute. *See Thompson*, 484 U.S. at 187, 108 S.Ct. at 520. Alaska errs, however, in seeking to impose upon Indian law doctrines from other fields of law. Because of the unique legal status of Indians in American jurisprudence, legal doctrines often must be viewed from a different perspective from that which would obtain in other areas of the law. *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980) ("The unique historical origins of tribal sovereignty make it

generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law."). Moreover, "standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985). Rather, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258, 84 L.Ed.2d 169 (1985). Statutes are to be construed liberally in favor of the Indians; ambiguous provisions are to be interpreted to the Indians' benefit. *Blackfeet Tribe*, 471 U.S. at 766, 105 S.Ct. at 2403.

With the foregoing principles of Indian law in mind, we see no reason that Congress would not have intended to give Indian tribes access to federal courts to determine their rights and obligations under the Indian Child Welfare Act. The Act includes an express congressional finding that state courts and agencies have often acted contrary to the interests of Indian tribes:

> Congress finds ... that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901(5) (1988). It would thus be ironic indeed if Congress then permitted only state courts, never believed by Congress to be the historical

defenders of tribal interests, to determine the scope of tribal authority under the Act.

In addition, Congress's intention to create a tribal cause of action under the Act can be inferred from Congress's understanding of the law at the time the Act was enacted. The intention of Congress can be gleaned, at least in part, by reference to prior law, as Congress is presumed to be knowledgeable about existing law pertinent to any new legislation it enacts. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85, 108 S.Ct. 1704, 1711-12, 100 L.Ed.2d 158 (1988). Thus, Congress can be presumed to know that statutes passed for the benefit of Indian tribes will be liberally construed in favor of such tribes. *See, e.g., United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 687 (9th Cir.1976); *Pence v. Kleppe*, 529 F.2d 135, 140 (9th Cir.1976); *Holt v. Commissioner*, 364 F.2d 38, 40 (8th Cir.1966), *cert. denied*, 386 U.S. 931, 87 S.Ct. 952, 17 L.Ed.2d 805 (1967). Congress can also be presumed to know that the federal courts routinely resolve questions of tribal sovereignty as they are implicated by various acts of Congress. *See, e.g., Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 376-79 (1st Cir.1975) (Passamaquoddy Tribe was "tribe" within meaning of Nonintercourse Act, 25 U.S.C. § 177); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231, 1236-37 (4th Cir.1974) (establishing impact of Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, on tribal sovereignty). If Congress did not seek to have such principles applied to the interpretation of the Indian Child Welfare Act, we presume that it would have said so. Thus we must conclude that the villages may seek determination of their rights under the Act in federal court.

As to Joseph's and Solomon's individual causes of action under the Indian Child Welfare Act, the same reasoning applies. The Act's full faith and credit clause does not restrict its rights to tribes. *See* 25 U.S.C. § 1911(d) (1988). Indeed, promotion of the stability of Indian families is a major objective of the Act. *See* 25 U.S.C. § 1902 (1988) ("[t]he Congress hereby declares that it is the policy of this nation ... to promote the stability and security of Indian tribes *and families*") (emphasis added); 25 U.S.C. § 1901(4) (1988) ("Congress finds ... that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies"). Without a cause of action under the Indian Child Welfare Act, Joseph and Solomon would be essentially left without a remedy. We cannot conceive that Congress intended such a self-defeating result.[4]

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[4] We note that even if the reasoning of *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988), were somehow relevant here, we would nonetheless be compelled to reach the same result. The Supreme Court observed that one of the chief purposes behind the Parental Kidnapping Prevention Act's full faith and credit provision was to "avoid jurisdictional competition and conflict between State courts." *Id.* at 177, 108 S.Ct. at 515 (quoting Pub.L. 96-611, 94 Stat. 3569, § 7(c)(5), note following 28 U.S.C. § 1738A). Accordingly, the provision was appropriately described as merely "a rule of decision *for* courts to use in adjudicating custody disputes." *Id.* at 183, 108 S.Ct. at 518. The Indian Child Welfare Act, on the other hand, involves more than mere jurisdictional determinations; it provides *substantive* concerns that a court *must* consider when making Indian child custody determinations. It follows, then, that a federal court may intervene when a state expressly refuses to abide by these substantive mandates.

As their final cause of action, the plaintiffs have alleged that Alaska's actions deprived them of their constitutional rights of substantive due process and freedom of association. *See* Complaint ¶ 17. The district court did not address these allegations in its order granting summary judgment. Absent an initial review of these claims by the district court, we decline to express an opinion as to their merit in any respect.[6]

III

Our jurisdiction thus established, we turn to the substantive issues implicated in this action.[6]

Congress enacted the Indian Child Welfare Act in 1978 pursuant to the national policy "to protect the best interests of Indian children and to promote the stability and security of Indian tribes." 25 U.S.C. § 1902 (1988). To promote this policy, Congress established in the Act "minimum Federal standards for the removal of Indian children from their families" and sought to ensure "the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." *Id.*[7]

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[6] Because the district court properly exercised jurisdiction over this action and because its entry of summary judgment is a final order, we have jurisdiction over the appeal under 28 U.S.C. § 1291. *See Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 298 (1989).

[6] We review *de novo* the grant or denial of summary judgment. *See Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 279 (9th Cir. 1989).

[7] Congress was motivated to act after it became dissatisfied with the then-existing situation for the adoption of Indian children. *See* 25 U.S.C. § 1901(4) (1988) (declaring congressional finding "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an

As the primary mechanism for advancing its objectives in the Act, Congress created a comprehensive jurisdictional scheme for the resolution of custody disputes involving Indian children. This scheme expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction. Indeed, state courts are powerless to resolve child-custody disputes concerning Indian children who reside on their tribal reservations; jurisdiction is exclusive in the tribe. *See id.* § 1911(a). In the case of Indian children who do not reside or are not domiciled on their tribe's reservation, state courts may exercise jurisdiction concurrent with tribal courts. However, the state court must refer the dispute to the appropriate tribal court unless good cause is shown for the retention of state court jurisdiction. *See id.* § 1911(b); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 35, 109 S.Ct. 1597, 1601, 104 L.Ed.2d 29 (1989) ("Section 1911(b) ... creates concurrent but presumptively tribal jurisdiction in the

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alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions"); *id.* § 1901(5) (declaring congressional finding "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families"). *See generally* Note, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Interests of Children, Families, and Tribes*, 63 S.Cal.L.Rev. 213, 214 (1989) (observing that the Act was enacted to "stem the flow of Indian children away from their natural families and tribes by establishing a jurisdictional, procedural, and substantive legal structure that recognizes tribal interests as well as the interests of the Indian children and their families in child custody proceedings").

case of children not domiciled on the reservation ...") Most importantly, whether such tribal jurisdiction is concurrent with or exclusive of state jurisdiction, all courts in the United States must give full faith and credit to the child custody determinations of tribal courts to the same extent that full faith and credit are given to the decisions of any other entity. *See* 25 U.S.C. § 1911(d) (1988).

For some tribes, the exclusive and referral jurisdiction provisions of sections 1911(a) and (b) became effective automatically following the enactment of the Act. However, tribes located within so called Public Law 280 states,[8] which include Alaska, can invoke such jurisdiction only after petitioning the Secretary of the Interior. *See id.* § 1918(a). Upon receipt of a proper petition, the Secretary has several options. He may grant the tribe exclusive jurisdiction over the entire reservation as provided in section 1911(a), allow the tribe to exercise exclusive jurisdiction only over limited community or geographic areas, or permit the tribe to exercise only referral jurisdiction pursuant to section 1911(b). *See id.* § 1918(b)(2).

The Indian Child Welfare Act includes Alaska natives within its definition of "Indians." *See id.* § 1903(3). Similarly, Alaska native villages are "Indian tribes" within the meaning of the Act. *See id.* § 1903(8); 43 U.S.C. § 1602(c) (1982). The parties agree that Venetie and Fort Yukon come within the meaning of

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[8] Broadly put, Public Law 280 gave to certain enumerated states concurrent jurisdiction over criminal and civil matters involving Indians, where jurisdiction had previously vested only in federal and tribal courts. *See infra* p. 561.

"Alaska Native Village" as defined by this Act. Similarly, both Ms. Joseph and Ms. Solomon are members of such an Alaska Native Village. Alaska, however, is a Public Law 280 state. Accordingly, the state contends that these native villages cannot exercise *any* child-custody jurisdiction unless and until they apply to the Secretary of the Interior and receive his approval as described above. The villages, on the other hand, maintain that they have, at the very least, concurrent jurisdiction by virtue of their inherent sovereignty.

In order to resolve this dispute, we must confront two issues. First, we must inquire whether the native villages are inherently sovereign, at least insofar as domestic relations or child-custody issues are concerned. Second, if such villages are possessed of such sovereignty, we must determine whether Congress has stripped the villages of that aspect of sovereign authority which encompasses child-custody determinations. We address each question in turn.

IV

The native villages of Venetie and Fort Yukon contend that they are sovereigns. Indeed, they argue that they are possessed of the same sovereignty as are Indian tribes in the lower forty-eight states. To address this contention, we must examine why Indian tribes in the continental United States are recognized as sovereign. If the rationales for sovereignty of such Indian tribes are equally applicable to Alaskan native villages, then we must conclude that they, too, are sovereigns.

"Indian tribes consistently have been recognized ... as 'distinct, independent political communities' qualified to exercise powers of self-government, not by

virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." F. Cohen, *Handbook of Federal Indian Law* 232 (1982 ed.) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832)). This is the view taken by the Supreme Court:

> The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which has never been extinguished. Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.

United States v. Wheeler, 435 U.S. 313, 322-23, 98 S.Ct. 1079, 1085-86, 55 L.Ed.2d 303 (1978) (citations, quotations, and emphasis omitted). In short, Indian tribes are currently recognized as sovereign because they were, in fact, sovereign before the arrival of non-natives on this continent.

The practical result of this doctrine is that an Indian tribe need not wait for an affirmative grant of authority from Congress in order to exercise dominion over its members. *See Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1257, 67 L.Ed.2d 493 (1981) ("the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152, 100 S.Ct. 2069, 2080, 65 L.Ed.2d 10 (1980) ("[t]he power to tax ... is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary

implication of their dependent status"). Sovereign authority is presumed until Congress affirmatively acts to take such authority away. *See, e.g., Wheeler*, 435 U.S. at 323, 98 S.Ct. at 1086 ("until Congress acts, the tribes retain their existing sovereign powers"). One noted commentator (a distinguished member of this Court) explains: "The point to be emphasized is that when a question of tribal power arises, the relevant inquiry is whether any limitation exists to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act." W. Canby, *American Indian Law* 71-72 (2d ed. 1988) (emphasis in original).[9]

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[9] In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), the Court suggested that the doctrine of inherent tribal sovereignty might be giving way to the doctrine of federal preemption as the sole basis for limiting state jurisdiction over Indian tribes. *See id.* at 172, 93 S.Ct. at 1262 ("[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption"). Drawing on *McClanahan*, Alaska contends that the native villages cannot successfully invoke inherent sovereignty as a bar to the state's jurisdiction. However, subsequent decisions by the Supreme Court make it clear that the doctrine of inherent sovereignty remains an independent barrier to state jurisdiction over tribal affairs. In *White Mountain Apache Tribe*, the Court explained:

> [C]ongressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them. *The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to*

In accordance with this doctrine of inherent tribal sovereignty, it follows that the Indian groups to be recognized as sovereigns should be those entities which historically acted as bodies politic, particularly in the periods prior to their subjugation by non-natives. There is, however, an additional prerequisite that an Indian group must meet in order to achieve present-day recognition as a sovereign: the modern-day group must demonstrate some relationship with or connection to the historical entity. *See United States v. State of Washington*, 641 F.2d 1368, 1372-73 (9th Cir.1981), *cert. denied*, 464 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 585-87 (1st Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979). In *United States v. State of Washington*, we held that in order for a group of Indians to enjoy the benefits of a treaty between the federal government and the tribe from which the Indians descended, the "group [of Indians] must have maintained an organized tribal structure." *State of Washington*, 641 F.2d at 1372. "[T]ribal status is preserved," we held, "if some defining characteristic of the original tribe persists in an evolving tribal community." *Id.* at 1372-73.

This requirement has been interpreted liberally in favor of Indian groups. "[C]hanges in tribal policy and organization attributable to adaptation do not destroy tribal status." *Id.* at 1373. We have been particularly

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activity undertaken on the reservation or by tribal members.

448 U.S. at 142-43, 100 S.Ct. at 2583-84 (emphasis added, citations and quotation omitted). Thus, we reject Alaska's contention that inherent sovereignty cannot be looked to as a bar to state jurisdiction.

sympathetic to changes wrought as a result of dominion by non-natives. *See id.*; *see also Mashpee Tribe*, 592 F.2d at 586 ("if a group of Indians has a set of legal rights by virtue of its status as a tribe, then it ought not to lose those rights absent a *voluntary decision* made by the tribe") (emphasis added). In general, we have continued to recognize tribal existence unless the tribe has voluntarily sought, and achieved, assimilation into non-Indian culture. *See State of Washington*, 641 F.2d at 1373 ("When assimilation is complete, those of the group purporting to be the tribe cannot claim tribal rights"); *Mashpee Tribe*, 592 F.2d at 587 ("If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear.") In sum, a relationship between the modern-day entity seeking tribal status and the Indian group of old must be established, but some connection beyond total assimilation is generally sufficient.[10]

With these fundamental concepts in mind, we turn to Alaska. Following the United States' purchase of Alaska in 1867, Congress paid little heed to the region's natives and was content to leave their legal status unresolved. The courts, however, could not escape the issue so easily.[11] In a series of cases, Judge Matthew

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[10] The Secretary of the Interior has promulgated regulations setting forth certain criteria which Indian groups in the continental United States must satisfy in order to achieve "tribal" status. *See* 25 C.F.R. § 83 (1989). These regulations essentially mirror the factors set forth above—historical origins and continuity. *See id.* § 83.7(a)-(c).

[11] *See generally* Harring, *The Incorporation of Alaskan Natives Under American Law: United States and Tlingit Sovereignty, 1867-1900*, 31 Ariz. L. Rev. 279, 283-84 (1989).

Deady, a federal district judge with chambers in the Pioneer Courthouse in Portland, Oregon, but occasionally sitting on the circuit court with jurisdiction extending to Alaska, held that Alaska was not "Indian country" for purposes of either the Indian Intercourse Act or the Revised Statutes of the United States. *See United States v. Seveloff*, 27 F.Cas. 1021, 1022 (D.Or.1872) (No. 16,252); *Waters v. Campbell*, 29 F. Cas. 411, 411-12 (C.C.D.Or.1876) (No. 17,264); *Kie v. United States*, 27 F. 351, 362-65 (C.C.D.Or.1886). Ultimately, a newly-created federal district court for Alaska expanded Judge Deady's view and declared that Alaska native groups were not independent sovereigns. The Alaska district court concluded that "[t]he United States has at no time recognized any tribal independence or relations among these Indians, ... [and that] they have been and now are regarded as dependent subjects." *In re Sah Quah*, 31 F. 327, 329 (D.Alaska 1886); *see also id.* ("their system is essentially patriarchal, and not tribal!").

As a result of these decisions, Alaska natives were treated as divorced from the rules of Indian law which applied to lower forty-eight tribes. *See Native Village of Venetie*, 687 F.Supp. at 1393 ("The law of aboriginal peoples in Alaska has remained distinct from Indian law for the continental United States, because of the different historical path taken in Alaska."); Harring, *supra*, at 283 n. 103 ("The cumulative effect of Deady's opinions was to deprive Alaska natives of the same right to sovereignty over their political affairs that Indians in the rest of the United States had.") The district court in the case at bar believed that a partial reconciliation had occurred. "Since *Sah Quah*, Alaska

has been partially assimilated to the national body of Indian law." 687 F.Supp. at 1398.

The district court erred, however, in believing that reconciliation was even necessary. Judge Deady's superannuated views of tribal sovereignty notwithstanding, such notions are not the law of the land today. Rather, if native groups in Alaska were sovereign prior to the incorporation of the land mass into the United States, they could lose their sovereignty only by express act of Congress or assimilation by the natives into non-native culture.

Indian sovereignty flows from the historical roots of the Indian tribe. *See Wheeler*, 435 U.S. at 322-23, 98 S.Ct. at 1085-86. Tribal sovereignty exists unless and until affirmatively divested by Congress. *See id.* at 323, 98 S.Ct. at 1086. Thus, to the extent that Alaska's natives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities.[12] If the native villages of Venetie

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[12] One commentator has suggested that Alaskan native villages should not be considered sovereigns because of unresolved questions concerning whether such villages occupy "Indian country." *See* Comment, *Alaskan Native Indian Villages: The Question of Sovereign Rights*, 28 Santa Clara L.Rev. 875 (1988). *But see* Note, *The Uncertain Legal Status of Alaskan Natives After* Native Village of Stevens v. Alaska Management & Planning: *Exposing the Fallacious Distinctions Between Alaska Natives and Lower 48 Indians*, 31 Ariz.L.Rev. 405, 419-21 (1989) ("[T]he federal government created reservations to 'forestall white Indian conflicts over lands,' not to recognize the sovereignty of indigenous groups.") (quoting F. Cohen, *Handbook of Federal Indian Law* 743 (1982 ed.)). However, tribal sovereignty is not coterminous with Indian country. *Cf.* 25 C.F.R. § 83.7(b) (1989) (in

and Fort Yukon are the modern-day successors to sovereign historical bands of natives, the villages are to be afforded the same rights and responsibilities as are sovereign bands of native Americans in the continental United States.

We cannot say on this record, however, whether the predecessors of the native villages of Venetie or Fort Yukon formed such bodies politic. Nor can we say whether Venetie or Fort Yukon can sufficiently trace their origins to such an identifiable historical sovereign that it should be considered the modern day successor

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order to achieve federal recognition, a group of Indians need not inhabit formal "Indian country", inhabitation of "a specific area" or a "community viewed as American Indian" is sufficient). Rather, tribal sovereignty is manifested primarily over the tribe's members. *See Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 2060, 109 L.Ed.2d 693 (1990) ("the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order [and] ... to prescribe and enforce rules of conduct for [their] own members"); *Wheeler*, 435 U.S. at 326, 98 S.Ct. at 1087 (powers such as enforcement of internal criminal laws "involve only the relations among members of a tribe [and t]hus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status"). A tribe's authority over its reservation or Indian country is incidental to its authority over its members. *Cf. Duro*, 110 S.Ct. at 2066 ("retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership," even if crime occurs on reservation); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 431, 109 S.Ct. 2994, 3008, 106 L.Ed.2d 343 (1989) (tribe's authority over reservation lands is limited to issues which "imperil the political integrity, economic security or the health and welfare of the tribe"); *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152, 100 S.Ct. at 2080 (power to tax on reservation is "fundamental attribute of sovereignty" as long as it "significantly involv[es] a tribe or its members").

to such an entity.[13] Answers to these questions must be provided, in the first instance, by the district court.[14]

V

Our inquiry cannot end here, however, as all is for naught if Congress has divested the villages of any inherent authority or sovereignty to make child custody determinations. The state of Alaska contends that such a statutory divestiture exists. Public Law 83-280,[15] the state asserts, stripped the villages of whatever authority they may have had to make child custody determinations. Alaska contends, and the district court apparently agreed, that Public Law 280 vested the enumerated states with exclusive, not

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[13] The correlation between the present-day group of Indians and any historical sovereign entity need not be perfect. *See supra* p. 668 (recognizing that changes caused by adaptation do not necessarily destroy an entity's sovereign status). That the native village I.R.A. councils have existed for only some 53½ years is in no way dispositive of this issue.

[14] The issue of inherent sovereignty has been presented to us before, at least with respect to the Native Village of Venetie. *See State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988). As here, we concluded that whether the Native Village of Venetie was a "tribe" worthy of sovereign recognition was a question of fact to be answered by the district court. *See id.* The dissenting justices in *Native Village of Stevens v. Alaska Management & Planning*, 757 F.2d 82 (Alaska 1988), advocated the same general approach, concluding that the issue of the native villages' sovereignty was a question of fact. *See id.* at 93-96 (Rabinowitz J., dissenting).

[15] Public Law 83-280 is not codified at one place in the United States Code. The criminal and civil provisions appear in separate titles. *See* 18 U.S.C. § 1162 (1988) (criminal); 28 U.S.C. § 1360 (1988) (civil). In accordance with common usage, we shall refer to this public law simply as "Public Law 280."

merely concurrent, jurisdiction over civil and criminal matters involving Indians. *See Native Village of Venetie*, 687 F.Supp. at 1382 ("Some states, called 'Public Law 280 states,' operate under federal statutes stripping tribal courts of most of their traditional jurisdiction, and giving state courts jurisdiction over Indian country in most respects.").

Alaska buttresses this contention by invoking section 1918 of the Indian Child Welfare Act, which provides that "[a]ny Indian tribe which became subject to State jurisdiction pursuant to [Public Law 280] ... may reassume jurisdiction over child custody proceedings" by following certain procedures. 25 U.S.C. § 1918(a) (1988). Alaska contends that section 1918 would be a meaningless provision if Public Law 280 did not vest exclusive jurisdiction in the states; if jurisdiction is not exclusive in the states, Alaska asks, what is there for the native villages to "reassume" under section 1918?

We must begin our analysis of Alaska's argument with a brief overview of Public Law 280. Enacted in 1953, Public Law 280 mandated the transfer of civil and criminal jurisdiction over "Indian country" from the federal government to the governments of five states,[16] and permitted other states to assume such jurisdiction voluntarily. In 1958, Alaska was added to the list of mandatory Public Law 280 jurisdictions. See Act of Aug. 8, 1958, Pub.L. No. 85-615, § 2, 72 Stat. 545. The civil portion of Public Law 280 provides as follows:

> Each of the [mandatory Public Law 280] States ... shall have jurisdiction over civil causes of

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[16] The five states were California, Minnesota, Nebraska, Oregon, and Wisconsin.

> action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

28 U.S.C. § 1360(a) (1988). It is not disputed that private adoption cases are included within this transfer of civil jurisdiction from the federal government to the states.

Although Public Law 280 was enacted during Congress's so-called "termination era" methodology of dealing with Indians,[17] the law "plainly was not intended to effect total assimilation of Indian tribes into mainstream American society." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244 (1987). The legislative history behind Public Law 280 is sparse, but Congress's primary motivation in enacting the legislation seems to have been a desire to remedy the lack of adequate criminal-law enforcement on some reservations. *See, e.g.*, S.Rep. No. 699, 83d Cong., 1st Sess., *reprinted in* 1953 U.S.Code Cong. & Admin.News 2409, 2412 ("[T]here has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States

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[17] *See* Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 U.C.L.A. L.Rev. 1051, 1067 n. 68 (1989) (summarizing general scholarly division of federal Indian policy into five discrete periods and noting that "termination era" lasted from 1943 to 1961).

indicating an ability and willingness to accept such responsibility."); *see also Bryan v. Itasca County*, 426 U.S. 373, 379, 96 S.Ct. 2102, 2106, 48 L.Ed.2d 710 (1976) ("The primary concern of Congress in enacting Pub.L. 280 ... was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement."); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L.Rev. 535, 540-44 (1975). In fact, certain tribes were exempted from the provisions of Public Law 280 because these tribes had a "'tribal law-and-order organization that function[ed] in a reasonably satisfactory manner.'" *Bryan*, 426 U.S. at 385, 96 S.Ct. at 2109, (quoting H.R.Rep. No. 848, 83d Cong., 1st Sess. 7, *reprinted in* 1953 U.S.Code Cong. & Admin.News 2413). In short, Public Law 280 was designed not to supplant tribal institutions, but to supplement them.

The Supreme Court has also adopted the view that Public Law 280 is not a divestiture statute. *See Cabazon Band of Mission Indians*, 480 U.S. at 207-12, 107 S.Ct. at 1087-90; *Bryan*, 426 U.S. at 383-90, 96 S.Ct. at 2108-12; *see also Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir.1990) ("Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law. Nothing in the wording of Public Law 280 or its legislative history precludes concurrent jurisdiction."). In *Bryan*, the Court observed that "nothing in [Public Law 280's] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than

'private voluntary organizations.'" 426 U.S. at 388, 96 S.Ct. at 2111 (quoting *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975)). The Court has rejected all interpretations of Public Law 280 which would result in an undermining or destruction of tribal governments. *See, e.g., Cabazon Band of Mission Indians*, 480 U.S. at 222, 107 S.Ct. at 1095 ("[s]tate regulation [of tribal bingo operation] would impermissibly infringe on tribal government" and therefore is not within Public Law 280's jurisdictional grant); *Bryan*, 426 U.S. at 388, 96 S.Ct. at 2110 ("[U]ndermining or destruction of such tribal governments ... [is] a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments.")

In addition, the so-called mandatory Public Law 280 states have, to the extent that they have addressed the issue, considered jurisdiction to be concurrent under Public Law 280. The Wisconsin Attorney General has opined that "[f]or nonregulatory proceedings, such as voluntary termination of parental rights, the tribal courts, and state courts pursuant to Pub.L. 280, have concurrent jurisdiction." 70 Op. Att'y Gen. Wisc. 237, 243 (1981). Likewise, the Attorney General for the State of Nebraska has written: "[U]nder Public Law 280 the tribe retained substantial inherent tribal authority over civil matters arising in Indian country. While some of this tribal jurisdiction and authority may have been concurrent with state jurisdiction (i.e., existing together with it), or while the Tribe may have chosen not to exercise all of its authority and jurisdiction, nonetheless that tribal jurisdiction and

authority was always there." Opinion No. 48, Opinion Letter from Robert M. Spire, Attorney General (Charles E. Lowe, Ass't Att'y General) to State Senator James E. Goll (March 28, 1985).

Finally, we note that Congress was aware, while drafting the Indian Child Welfare Act, that the U.S. Department of Justice viewed Public Law 280 as providing for concurrent jurisdiction among state and tribal courts. Then-Assistant Attorney General for Legislative Affairs Patricia M. Wald wrote to Interior and Insular Affairs Committee Chairman Morris K. Udall: "As you may be aware, the courts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, *unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83-280.*" Letter from Assistant Attorney General Patricia M. Wald to Hon. Morris K. Udall (Feb. 8, 1978), included in H.R.Rep. No. 1386, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S.Code Cong. & Admin.News 7530, 7558 (emphasis added).

In spite of the foregoing, Alaska suggests that section 1918 of the Indian Child Welfare Act would be rendered meaningless by any non-divestiture interpretation of Public Law 280. However, the two statutes can be harmonized without construing Public Law 280 as a divestiture statute. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018, 104 S.Ct. 2862, 2880, 81 L.Ed.2d 815 (1984) (statutes capable of being harmonized should be so construed). The relevant portions of the Indian Child Welfare Act enable the Secretary of the Interior to grant to a tribe, upon receipt of a proper petition, exclusive jurisdiction (over

all or a portion of the appropriate "Indian country") or referral jurisdiction of child-custody proceedings. *See* 25 U.S.C. § 1918(b)(2) (1988). Each of these types of jurisdiction is broader than any tribal jurisdiction which is concurrent with the states. Exclusive jurisdiction, of course, is clearly broader than concurrent jurisdiction. Likewise, referral jurisdiction is broader in scope than concurrent jurisdiction, in that referral jurisdiction is concurrent *but presumptively tribal* jurisdiction. *See id.* § 1911(b). Thus, there is something for a tribe to "reassume" under section 1918—namely, exclusive or referral jurisdiction—even if Public Law 280 is read as not divesting the tribes of concurrent jurisdiction.

In sum, giving the benefit of doubt to Alaska, we conclude that Public Law 280 and the Indian Child Welfare Act are, at best, ambiguous as to whether states have exclusive or concurrent jurisdiction over child custody determinations where the tribe has not petitioned for exclusive or referral jurisdiction. Of course, ambiguities are to be resolved to the benefit of Indians. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985). Accordingly, resolving the jurisdictional ambiguities in favor of the villages, we hold that neither the Indian Child Welfare Act nor Public Law 280 prevents them from exercising concurrent jurisdiction. If the native villages of Venetie and Fort Yukon are sovereign entities which may exercise dominion over their members' domestic relations, Alaska must give full faith and credit to any child-custody determinations made by the villages' governing bodies in accordance with the full faith and credit clause of the Indian Child Welfare Act.

VI

We affirm the district court's grant of summary judgment insofar as it dismissed the plaintiffs' claims for damages or other retroactive relief. However, we reverse the district court's order granting summary judgment to Alaska on the plaintiffs' claims requesting injunctive or declaratory relief. On remand, the district court must determine whether the native villages of Venetie and Fort Yukon are the modern-day successors to an historical sovereign band of native Americans. If the district court determines that either village is a successor to such a sovereign, it must provide the relief necessary to ensure that the state of Alaska affords full faith and credit to adoption decrees issued by the tribal courts of the native village.

Parties will bear their own costs.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

FILED
OCT 14 2009
MOLLY C. DWYER,
CLERK
U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KALTAG TRIBAL COUNCIL; HUDSON SAM; SALINA SAM,

Plaintiffs – Appellees,

v.

KARLEEN JACKSON, in her official capacity as Commissioner of Alaska Department of Health and Social Services; BILL HOGAN, in his official capacity as Deputy Commissioner of Alaska Department of Health and Social Services; and PHILLIP MITCHELL, in his official capacity as Section Chief of the Alaska Bureau of Vital Statistics,

Defendants – Appellants.

No. 08-35343

D.C. No. CV-06-211-TMB

ORDER

ORDER

Before: FARRIS, THOMPSON and RAWLINSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny appellants' petition for rehearing. Judge Rawlinson has also voted to deny their petition for rehearing by the court en banc, and Judges Farris and Thompson have recommended denial of that petition.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.

25 U.S.C. § 1901
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes[1]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often

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[1] So in original. Probably should be capitalized.

unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1902
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1903
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for

adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

* * *

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43;

* * *

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or

individual subject to a restriction by the United States against alienation;

* * *

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

25 U.S.C. § 1911
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an

Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1912
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or

termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian

custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1913
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian

child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 U.S.C. § 1918
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be

provided pursuant to any agreement under section 1919 of this title.

25 U.S.C. § 1919
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

25 U.S.C. § 1922
TITLE 25. INDIANS
CHAPTER 21. INDIAN CHILD WELFARE
SUBCHAPTER I. CHILD CUSTODY PROCEEDINGS

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

VILLAGE OF KALTAG CONSTITUTION AND LAWS

.....SECTION ONE.....

PART 1

We, the residents of Kaltag, recognize the Law of God and the law of the country to be the Law of our Village.

In order to better observe these laws and make our village a happy place for ourselves and our children, we pledge:

1—our mutual cooperation among all who live here

2—our respect and submission to our elected leaders and their decision.

PART 2

We further establish the following Constitution and Laws to be observed by all who live or visit in the village.

Criticism of these articles or opposition to the Village Council may be freely voiced by anyone at a meeting called for the purpose, but shall not be tolerated at any other time.

VILLAGE GOVERNMENT

We delegate to our council the authority they need to be our effective leaders.

PART 3

VILLAGE COUNCIL: Is composed of five members, elected for one year. In the absence of some members of the council, those in the village at the time will assume all powers and duties of the council.

PART 4

ELECTIONS: Shall take place once a year, at the beginning of the school term, as soon as everybody is back in the village.

PART 5

CANDIDATES: Men or women are eligible. The candidates for office shall volunteer to serve the council, they will give their names to the Secretary at least 48 hours before the date set for elections, and these names shall be posted in public places at the same time.

PART 6

RIGHT TO VOTE: All residents of the village who have reached the age of 18 have a right to cast a ballot.

PART 7

ELECTIONS: They shall take place at a public meeting called for the purpose, and are decided by the majority of the ballots cast.

PART 8

Once the council members have been elected, successive ballots shall be cast to select among them the President, Vice President, Secretary and Treasurer.

PART 9

All balloting shall be by secret ballots: they are counted by the President and verified by the Secretary and the other Councilmen.

PART 10

If two candidates receive the same number of votes, a new ballot shall be taken to break the tie: if this is not successful, the two candidates shall draw for the winner (flip a coin, or draw names on slips of paper).

PART 11

Immediately upon being elected, the new officers will assume their positions and take the following oath of office:

PART 12

"I ..... conscious of my responsibility toward God and my fellow citizens, solemnly promise to fulfill to the best of my abilities all the obligations of the Office to which I have been elected. So Help me God."

.....SECTION TWO.....

PART 1

DUTIES OF THE COUNCIL: The councilman shall take their office and its responsibilities very seriously and at all times give good example and work for the good of all those who live in the Village.

PART 2

It is their responsibility to take the initiative necessary for the welfare and happiness of the village, and the development of our resources.

PART 3

If any councilman is guilty of public drunkenness, disorderly conduct or other serious offense, the council shall meet to require his resignation and provide for a partial selection to replace him.

PART 4

THE PRESIDENT:

- Shall be chairman of all meetings
- represent the village interests in dealing with outsiders
- consider himself more personally responsible for the execution of the laws and the village welfare

In his absence, the Vice President, then the Secretary and the Treasurer shall assume his duties.

PART 5

THE SECRETARY: Shall keep a written record of all the meetings.

Shall be responsible for the safekeeping of all correspondence and other documents pertaining to village affairs.

PART 6

THE TREASURER: Shall keep an exact record of all monies received or spent.

- A majority decision of the council is necessary to spend money for minor expenses; but larger amounts can be spent only after they have been approved by a village meeting.

PART 7

POWER OF THE COUNCIL: To make any ORDINANCE they judge necessary for the common good. An ordinance is a temporary order issued by the council: it may be come a permanent law if it is ratified by a village vote.

PART 8

To impose fines or public work if it becomes necessary to enforce this Constitution and Laws.

PART 9

To act as judges of minor offenses or small differences among village residents. These small matters, we should always try to settle among ourselves.

PART 10

HOWEVER, everyone conserves his right to take up these matters with any proper authority. The council shall not act in serious matters, but has the duty to report them to proper authorities.

PART 11

MEETINGS: (council meetings): shall meet regularly, at least twice a month during the first and third week.

PART 12

Anyone can request to appear before the council at these meetings, the councilmen can request anyone to be present if they judge it necessary.

In urgent matters, anyone can request a special meeting to be held, if this request is backed by at least fifteen signatures.

.....SECTION THREE.....

PART 1

Village meetings: They shall be announced with their subject matter and notices posted to that effect at least 24 hours in advance.

PART 2

All meetings are to open at the exact time, regardless of the number of people present or absent, and the decisions approved by the majority of those present are binding on all. However, in very important matters, such as elections, a minimum of 25 people present shall be required to constitute a quorum.

PART 3

MEETINGS, PROCEDURE: All meetings are presided over by a Chairman, and current parliamentary procedure is to be followed: motions and

standing votes, unless the Chairman or a single motion from the floor requests a secret ballot.

PART 4

PERSONAL RESPONSIBILITY: All village residents shall consider it their business to promote happiness, peace and order in the village; they must assist their council in every possible way to make their work and responsibility as light as possible.

PART 5

Anyone knowing any serious abuse or evil shall report it to the council or to proper authorities; he shall be ready to prove his charges and to be confronted with the defendant. No one shall ever speak of such matters with those who have no power to stop them. Malicious gossip and calumny shall never be tolerated.

PART 6

CHANGES IN CONSTITUTION AND LAWS: They can be made if 2/3 of the qualified voters favor a constitutional change. A simple majority of the voters is sufficient to change existing laws or to introduce new ones.

.....

LAWS

CHILDREN: The parents are responsible for the conduct of their children and for any damage they may cause. Unless accompanied by their parents, all school children shall be home by 9 P.M. Parents shall be fined 50 cents anytime they fail to make their children follow this order.

DOGS: To safeguard children and property, all dogs 4 months or older shall be securely tied at all times. Any dog habitually loose may be destroyed by anyone.

PEACE AND ORDER: Drunkenness or disorderly conduct shall be punishable by fines from 5 to 10 dollars. The fine shall be doubled if the guilty party refuses to obey peacefully when ordered to go home.

PROTECTION OF PROPERTY: Anyone who witnesses stealing or damaging property must do everything in his power to stop it and has a duty to report it to the council, especially when it is a question of locked houses or boats on the beach.

HEALTH AND SAFETY: The council shall appoint one of its members to be Health and Safety Officer. His duties are:

– Safe disposal of garbage at designated places

– Removal of fire or accident hazards in the village: dry grass, snow drifts or ice on sidewalks, etc.

Supreme Court, U.S.
FILED
MAR 25 2010
OFFICE OF THE CLERK

No. 09-960

In The

Supreme Court of the United States

WILLIAM H. HOGAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ALASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

KALTAG TRIBAL COUNCIL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court and the court of appeals correctly held – consistent with the decisions of the Alaska Supreme Court and all other reported decisions, and consistent with petitioner State of Alaska's repeated position in prior litigation – that § 1911(d) of the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (ICWA), requires Alaska to "give full faith and credit to the judicial proceedings of" the Kaltag Tribe applicable to an "adoptive placement proceeding" when Indian guardians from a neighboring Tribe invoked the jurisdiction of the Kaltag Tribal Court in order to adopt a child of the Kaltag Tribe.

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In The
Supreme Court of the United States

No. 09-960

WILLIAM H. HOGAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ALASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

INTRODUCTION

Nearly 20 years ago the Ninth Circuit affirmed that, so long as an Alaska Native Village is federally recognized as an Indian Tribe, its retained tribal sovereignty includes the authority to adjudicate an adoption proceeding in its tribal court involving the custody and welfare of a tribal child. *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) (writing for a unanimous court, Judge O'Scannlain applied this rule where an adoptive

Indian parent from a neighboring Tribe invoked a tribal court's jurisdiction). In essentially now seeking review of that unremarkable decision – which Alaska state courts have firmly embraced, *see John v. Baker*, 982 P.2d 738 (Alaska 1999), *cert. denied* 528 U.S. 1182 (2000); *In re C.R.H.*, 29 P.3d 849 (Alaska 2001); *Native Village of Tanana v. State*, No. 3AN-04-1214 CI, slip op. (Ak. Sup. Ct. May 25, 2007), *appeal argued*, No. S-13332 (Alaska Dec. 10, 2009), and which petitioner until 2004 likewise firmly embraced, *see* Amicus Brief of the State of Alaska at 4-6, *John*, 982 P.2d 738 (No. S-08099); Appellee State of Alaska's Brief at 25, *C.R.H.*, 29 P.3d 849 (No. S-09677) – petitioner is 20 years too late.

Unlike its position in *Venetie*, petitioner no longer asserts that Alaska Native Villages are not federally recognized Tribes possessed of the usual attributes of retained tribal sovereignty, including the same privileges and immunities, generally enjoyed by all Indian Tribes. Pet. 17 n. 12.[1] Petitioner also no longer

[1] *See also John*, 982 P.2d at 749 ("[W]e hold that Alaska Native tribes, by virtue of their inherent powers as sovereign nations, do possess [non-territorial] authority [to resolve domestic disputes]"); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54364, 54366 (Oct. 21, 1993) (Alaska Tribes "have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States"); Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, Title I, §§ 101-104, 108 Stat. 4791 (codified in part at 25 U.S.C. §§ 479a-479a-1). Petitioner's concession on this point, Resp. App. 4, together with congressional and secretarial actions,

(Continued on following page)

asserts that something in the ICWA divested Indian Tribes of any of their retained tribal sovereignty over tribal children, whether inside or outside areas denominated "Indian country."[2] And petitioner also no longer asserts that something in Public Law No. 83-280, 67 Stat. 588 (1953) (Public Law 280), *codified in part as amended at* 28 U.S.C. § 1360, divested Indian Tribes in Alaska of any of their retained tribal sovereignty over tribal children, whether inside or outside areas denominated "Indian country."[3] Indeed, by framing its question presented as being limited to only "nonmembers," Pet. i, petitioner no longer asserts that Indian Tribes in Alaska lack jurisdiction to adjudicate *ab initio* in their tribal courts custody proceedings and adoptions involving tribal children and other tribal members.[4]

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is a complete answer to Amici's suggestion that the issue of tribal recognition is properly presented in this case. Amici Br. at 15-16.

[2] *See Venetie*, 944 F.2d at 562 ("Neither the [ICWA] nor Public Law 280 prevents [the Tribe] from exercising concurrent jurisdiction"); *John*, 982 P.2d at 753 (the ICWA was not meant to "eradicate tribal court jurisdiction over family law matters," but rather the "ICWA's goal was to increase tribal control over custody decisions involving tribal children," and the "ICWA's very structure presumes [that Tribes] are capable of adjudicating child custody matters in their own courts").

[3] *See John*, 982 P.2d at 745-46 (recognizing *Venetie*'s holding that "[Public Law] 280 had not stripped the villages of sovereignty over child custody issues because it had granted the states only concurrent jurisdiction").

[4] Amici's assertion that Tribes in Alaska possess no sovereign authority whatsoever thus goes far beyond the Petition

(Continued on following page)

Petitioner's sole argument is that the foregoing acknowledged inherent sovereignty that a Tribe possesses over the welfare of an at-risk tribal child does not extend to adjudicating the rights to that child of a putative Indian father from a neighboring Tribe, nor of an adoptive Indian couple from a neighboring Tribe who wish to adopt that child. The problem with presenting that question in this case, as it would have been in *Venetie*, is that both the putative father and the adoptive parents below *consented* to – indeed, in the case of the adoptive parents here, they actually *invoked* – the Kaltag Tribal Court's jurisdiction. Granting certiorari to determine whether Indian citizens from neighboring Tribes can *consent to or invoke* the jurisdiction of a Tribal Court in connection with a proceeding involving the welfare of an at-risk tribal child who has now been adopted for four years is hardly a sensible use of this Court's scarce resources.

That is all that this case is about. The ICWA requires that every State give "full faith and credit" to all acts and proceedings of the courts of an "Indian tribe," § 1911(d), a term which petitioner concedes expressly includes Alaska Native villages. Pet. 17 n. 12; *see also* § 1903(8). The Kaltag Tribe is one such village. For years the Tribe took care to protect and guard the interests of one at-risk village child, Baby

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and is an assertion that was never raised below. Amici Br. at 8, 11.

N.S., from abuse and neglect by her troubled single-mother and putative absent father. After years of failed reunification efforts (including the mother's imprisonment for a parole violation on a prior Murder II conviction), the mother and putative father consented to the termination of their parental rights and to the adoption of the child into a new home through proceedings instituted in the Kaltag Tribal Court. At no time did any party ever raise a jurisdictional objection, nor did petitioner object to the Tribal Court's action, even though petitioner was well aware of the proceedings. Everyone's silence is hardly surprising, considering that the adoptive parents from the neighboring Tribe *invoked* the Kaltag Tribal Court's jurisdiction.

Only when the adoptive parents sought a substitute birth certificate from Alaska's Bureau of Vital Statistics did petitioner refuse, now contending that an intervening 2004 Opinion from a new state Attorney General prohibited the Bureau from according full faith and credit to *any* Alaska tribal court decree issued in a case that did not originate in, and was not transferred from, a state court. That opinion was a sharp break from the State's prior positions taken in the *John* and *C.R.H.* litigation, and it called into question the State's obligation under the ICWA to "give full faith and credit" to *all* child welfare cases originating in tribal courts – even cases involving exclusively tribal members. Although petitioner's purported limitation of the proposed question presented here to "nonmember[s]" suggests a more narrow

issue, the logic of petitioner's State-as-gatekeeper-to-tribal-courts argument challenges *all* tribal-initiated court proceedings involving the welfare of tribal children – even voluntary adoptions of the kind presented here, and even proceedings exclusively among tribal members.

Petitioner's new, narrow and extreme view of tribal authority over tribal children has never been adopted by any court anywhere, and it was properly rejected by the court of appeals here, just as it was by a different three judge-panel in *Venetie*. As history has shown in the 20 intervening years since *Venetie* was decided, the sky has not fallen on the States where Indian Tribes initiate proceedings to protect tribal children, whether both parents are tribal members or where one parent is from another Tribe but *consents* to the court's jurisdiction. Not only has the sky not fallen, but petitioner itself has urged its own Supreme Court, repeatedly – up until the new Attorney General's flip-flop opinion was released in 2004 – to *embrace* the *Venetie* ruling as a matter of state law, so that the State and Tribes could work together in partnership to provide a more complete and effective set of protections for children in need of aid across Alaska's vast expanse.

Unable to identify *any* other case in which there is a true decisional conflict, petitioner stretches to invent a conflict with more recent decisions of this Court – none of which involved the commonplace assertion of tribal jurisdiction over the welfare of a tribal child, much less a case where any non-member parties had *consented to or invoked* the tribal court's

jurisdiction. Petitioner's theory that Congress through the ICWA vested in the States the role of gatekeepers over all cases that might thereafter be heard by a tribal court involving a child domiciled outside Indian country turns upside down Congress' protective purpose to *strengthen* tribal interests in the welfare of tribal children. As the Ninth Circuit made clear 20 years ago in *Venetie*, and as this Court made clear two years earlier in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), the ICWA was intended to supplement and complement the powers of Tribes, not to diminish them. The petitioner simply ignores that inconvenient part of the court of appeals' analysis, which is unassailable.

Because there is no conflict with any other court, and because the facts below make this case a poor vehicle for deciding a question that was never presented, much less decided below – namely the authority of a tribal court to adjudicate the rights of a non-consenting non-member parent of a tribal child – the Petition should be denied. The "decision to grant certiorari represents a commitment of scarce judicial resources," *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985), and "it is certainly safe to assume that whenever [the Court] grant[s] certiorari in a case not deserving plenary review, [it] increase[s] the likelihood that certiorari will be denied in other, more deserving cases." *Watt v. Alaska*, 451 U.S. 259, 274 n. 1 (1981) (Stevens, J., concurring). Such would be the outcome if the Court were to grant certiorari here.

COUNTER STATEMENT

Contrary to petitioner's hyperbole, the decision below preserves – indeed, has nothing to do with – the authority of Alaska's state courts to exercise jurisdiction in "involuntary" child custody proceedings (that is, cases in which a parent objects to a court's jurisdiction). It also has nothing to do with involuntary tribal jurisdiction over non-member Indians, since the one putative parent here who is from another Tribe waived any jurisdictional objection, and because the State – which was fully informed about the child protection proceeding – never raised that issue below. This case is strictly about tribal jurisdiction that is concurrent with state jurisdiction. It concerns a voluntary, consensual adoption proceeding, and the court of appeals' routine application of settled law does not warrant plenary review.

Indeed, up until petitioner's sudden reversal of position in 2004, petitioner *embraced* the rule of law that it now seeks to overturn, recognizing 156 tribal court adoption orders issued by 45 different tribal courts. Resp. App. 1-4. Petitioner actively *supported* the rule of law that has been affirmed here and that has been previously adopted by the Alaska Supreme Court *at petitioner's urging*, which is that federally recognized Tribes in Alaska possess inherent jurisdiction – concurrent with the State's – over proceedings involving tribal children. The only new issue petitioner now seeks to raise – involuntary tribal court jurisdiction over a non-member Indian parent – is simply not presented here.

A. Factual Background

1. In the wake of this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), the Alaska Supreme Court took up the residual question of whether Alaska Tribes have sovereign authority over their members even though Alaska Tribes do not generally occupy Indian country. *John*, 982 P.2d at 748. While not parties to the proceeding, the State of Alaska and the Federal Government were invited to express their views. Both filed amicus briefs urging the Alaska Supreme Court to bring its common law into conformity with more recent actions by all three branches of the federal government recognizing Alaska Tribes as sovereigns with retained authority over their members, including conformity specifically with the very decision of the Ninth Circuit in *Venetie* which the State now disparages.

As petitioner explained at the time, the issue was one of extraordinary importance to Alaska:

> [T]he conflict between this court's rulings in *Native Village of Nenana v. State of Alaska, DHSS*, 722 P.2d 219 (Alaska 1986) and its progeny, and the decision of the United States Court of Appeals for the Ninth Circuit in [*Venetie*], has left the State in an untenable position. On the one hand, it must abide by the law of this State as determined by this court; on the other, its failure to follow the Ninth Circuit's interpretations as it relates to any villages other than those involved in [*Venetie*] has resulted in repeated

> suits filed by tribes in federal court, challenging the State's inability to recognize tribal court orders. These suits have tied up the lives of the affected persons, particularly delaying permanent placements for children, and have diverted state resources from necessary state services. The State wants to cooperate more closely with tribes, avoiding duplicative programs and stretching our combined resources further than either could manage separately, particularly in the under-served regions of Alaska.

Amicus Brief of the State of Alaska at 1, *John,* 982 P.2d 738 (No. S-08099).

After analyzing this Court's jurisprudence on the nature of inherent tribal sovereignty, the Alaska Supreme Court *agreed* with petitioner and concluded that "Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members," in particular, in cases involving tribal children, regardless of whether or not the Tribe occupies Indian country. *John*, 982 P.2d at 748-49. In opposing certiorari in this Court in *John*, the State filed an amicus brief in support of tribal authority, arguing persuasively:

> In an effort to paint a Jurisdictional conflict where none exists, petitioner mischaracterizes the Jurisdictional consequences of the Alaska Supreme Court's decision. The decision does not, as suggested by the petition, empower Alaska tribes to "supersede" the

> jurisdiction of Alaska courts to adjudicate child custody disputes. Instead, the decision confirms the jurisdiction of the Alaska state courts, concurrent with Alaska tribal courts, to hear child custody disputes involving tribal children.
>
> Indeed, recognition of concurrent jurisdiction between state and tribal courts provides improved access to judicial resolution of parental custody disputes, especially for rural Alaskans. When coupled with the newly articulated comity criteria, it will also reduce parents' forum shopping in these cases. The Alaska Supreme Court's comity holding is thus an appropriate state law accommodation of the State's efforts to enhance cooperation between state and tribal court systems in Alaska.

Brief for the State of Alaska as Amicus Curiae in Support of Respondent at 8-9, *Baker v. John*, 528 U.S. 1182 (2000) (No. 99-973) (internal citations omitted). Thereafter, Alaska Governor Tony Knowles issued Administrative Order 186 (Sept. 29, 2000) acknowledging the legal and political existence of Alaska's federally recognized Tribes, and directing Alaska's Executive Branch to work on a government-to-government basis with Alaska's sovereign Tribes.

A year later the Alaska Supreme Court addressed whether Public Law 280 divested Tribes in Alaska of their pre-existing inherent jurisdiction and, as a consequence, whether Alaska Tribes could receive transfer of ICWA cases from a state court to a tribal

court under § 1911(b) of the ICWA (or whether, instead, such Tribes would first have to petition the Secretary of the Interior to reassume such jurisdiction under § 1918 of the ICWA). *See In re C.R.H.*, 29 P.3d 849 (Alaska 2001). In *C.R.H.*, the State had technically opposed a motion to transfer a child custody proceeding under § 1911(b) from state court to tribal court, while indicating its desire to *support* the requested transfer. *Id.* at 851. The State explained that its technical opposition to the transfer stemmed from the fact that, despite the State's own earlier request in *John* that the court "overrule" *Nenana* and similar cases, the court had not yet done so. *Id.* The State was therefore "constrained until the Alaska Supreme Court overrules these decisions." *Id.* The State then filed a brief urging the Alaska Supreme Court to confirm that Alaska Tribes *could* hear cases transferred from state court without the Tribes first petitioning the Secretary to "reassume" such jurisdiction under § 1918 of the ICWA. Appellee State of Alaska's Brief at 26-29, *C.R.H.*, 29 P.3d 849 (No. S-09677) (explaining that the ICWA § 1918 process is for securing "exclusive" tribal jurisdiction, not the concurrent jurisdiction that already exists). The Alaska Supreme Court agreed, upholding the right of Alaska Tribes to secure transfer jurisdiction under § 1911(b) and expressly overruling everything to the contrary in *Nenana* and related earlier decisions. *C.R.H.*, 29 P.3d at 854. Though petitioner now asserts that Alaska's courts have had "difficulty" in "grappling with this important issue," Pet. 21-22, it would

be more accurate to say that modern Alaska case law is squarely and uniformly against petitioner.

In 2002, Alaska Attorney General Bruce Botelho issued an advisory Opinion to the Department of Health and Social Services (DHSS) providing instructions on how to implement the Alaska Supreme Court's decisions in *John* and *C.R.H.*, and how DHHS and its agencies should work cooperatively with Alaska tribal agencies and courts. Pet. 22 n. 15. In the meantime, between June 1, 2000 to September 3, 2004, the Alaska Bureau of Vital Statistics recognized 156 tribal court adoptions issued by 45 tribal courts in Alaska. Resp. App. 1-4. Thus, as of 2004, Alaska Tribes and the State worked cooperatively for the overall protection of tribal children and did so without any evidence of adverse consequences either to those children or to others.

2. Following a new election, a newly-appointed Attorney General struck out on a radically different course. In clear disregard of the Alaska Supreme Court and of his own predecessors, Attorney General Gregg Renkes suddenly revoked Attorney General Botelho's Opinion and substituted for it a new Opinion issued October 1, 2004. 2004 Op. Att'y Gen. No. 1 (Oct. 1, 2004) (Renkes Opinion). The new Opinion accepted the bare holdings of *John* and *C.R.H.* but purported to carve out from any "full faith and credit" ICWA recognition the decrees from any adoption or child protection proceedings issued by any tribal court where the tribal court proceedings did not originate in and were not transferred from a state court.

For all such cases, the Renkes Opinion declared that state agencies were no longer to recognize any concurrent tribal court jurisdiction over children's cases unless the Tribe at issue first successfully petitioned the Secretary of the Interior to "reassume" jurisdiction under § 1918 of the ICWA – essentially the very opposite of the position Alaska successfully advanced in *C.R.H.* DHSS complied with these new instructions by repealing all prior cooperative policies, and by putting in their place new policies that effectively instructed DHSS caseworkers to ignore all tribal court child protection or adoption proceedings. This effected a 180-degree turn in state policy toward Alaska tribal courts in the context of children's proceedings, and needlessly created conflict and confusion where none had existed before.

3. Shortly after these events, five Tribes, together with a non-Native couple who had adopted an Indian child in tribal court, brought suit in the Alaska Superior Court to restore the *status quo ante* and to secure once again a declaration that Alaska Tribes possess inherent authority over the domestic relations of their tribal members, including original jurisdiction to initiate all children's proceedings involving tribal children such as adoption proceedings. The Alaska Superior Court entered an Order and Judgment in favor of plaintiffs, holding that "[t]here is nothing in ICWA that prohibits or limits Tribes from passing laws that would allow the Tribe to initiate [Child in Need of Aid] cases in tribal court. As such, the inherent sovereign power of the tribes

remains intact." *Native Village of Tanana v. State*, No. 3AN-04-1214 CI, slip op. 17-18 (Ak. Sup. Ct. May 25, 2007), *appeal argued*, No. S-13332 (Alaska Dec. 10, 2009). In the *Tanana* appellate litigation, petitioner raises all of the same jurisdictional challenges that it now asserts here.

4. The facts giving rise to this case began long before petitioner's recent about-face. Baby N.S. was born on October 18, 1999, to a troubled single-mother on parole from a "Murder II" conviction. *See State v. G.S.*, Case No. 4FA-S90-00254 CR, Temporary Order (Ak. Sup. Ct. Sept. 5, 2003) (revoking parole). On June 10, 2000, a tribal child welfare worker and a tribal mental health counselor investigated a report of harm and found the mother "passed out at noon" and unable to care for Baby N.S., then eight months old. *In re N.S.*, Case No. 00-0611, Order Granting Temporary Custody at 1 (Kal. Trib. Ct. June 13, 2000). The Kaltag Tribal Court entered an Order of Emergency Custody on June 11, 2000, making Baby N.S. a ward of the Tribal Court and temporarily placing her with V.B. *Id.* The court based its subject matter jurisdiction on the fact that Baby N.S.'s mother is a member of the Kaltag Tribe, that the child is therefore a tribal member under Kaltag's Constitution, and that Kaltag is a federally recognized Indian Tribe. *Id.*; *see also* 25 U.S.C. § 1903(8). During a follow-up hearing on June 13, 2000, the mother stated that the "father of the child is unknown" and expressed concern regarding her conditions of probation. *N.S.*, Order Granting Temporary

Custody at 2 (June 13, 2000). In the interest of "monitor[ing] her well-being," the court retained legal custody of Baby N.S., ordering the child's mother, G.S., to "immediately begin counseling," and also ordering that physical custody should remain with V.B. "until [G.S.] is sober and able to care for [the] child." *Id.* at 2.

The court returned custody of Baby N.S. to the mother on July 7, 2000, after the mother reported being "sober for nearly a month." *N.S.*, Case Review and Order Relinquishing Custody at 1 (July 7, 2000). But on September 2, 2000, a Kaltag tribal health aide made another report of harm that Baby N.S. (now ten months old) was "in her mother's home with intoxicated adults." *N.S.*, Order Granting Temporary Custody at 1 (Sept. 6, 2000). A child safety check at the home by a child welfare worker found that N.S. "smelled strongly of urine, she had a raw neck, and a bruise on her right cheek." *Id.* On September 5, 2000, a State Division of Family and Youth Services (DFYS) case worker "was in Kaltag and found [G.S.] passed out at the home of [A.C.] and was unable to wake her." *Id.* at 2. But petitioner initiated no action in state court, neither at that time nor at any other time.

Baby N.S. was temporarily placed with L.S. until she could be placed with her maternal aunt and uncle, J.S. and G.S., in the Village of Nulato. *Id.* at 3. This order was extended an additional 30 days after the mother completed a recovery program, but the mother became intoxicated immediately upon re-entering Kaltag. *N.S.*, Order Granting Temporary

Custody at 2-3 (Nov. 6, 2000). Upon learning that Baby N.S.'s mother had left for Fairbanks and was reincarcerated following the previous hearing, the court extended custody of Baby N.S. an additional 90 days, *N.S.*, Order Granting Temporary Custody at 2-3 (Dec. 14, 2000), and thereafter for another 90 days upon learning she planned to reenter detox. *N.S.*, Order Granting Temporary Custody at 3 (Mar. 29, 2001).

During a subsequent status hearing, the court determined that Baby N.S.'s putative father was a tribal member from a neighboring village. *N.S.*, Order Granting Temporary Custody at 1 (Mar. 28, 2003). The putative father was contacted and asked to take a paternity test and to give a Kaltag child welfare worker a list of possible family members who might be considered for a temporary custody placement of the child. *Id.* at 3-5. The putative father refused to take custody of Baby N.S. and stated that he was unaware of anyone from his family who could take custody of the child. *Id.* at 3. He waived his right to be present at the temporary custody hearing, *id.*, and would later state that he did "not want his family involved in this situation" and that placement with him was "out of the question" because he "barely takes care of himself." *N.S.*, Order Granting Temporary Custody at 2 (July 10, 2003).

Between June 10, 2000 and March 8, 2004, Baby N.S. was cared for by six Indian custodians. During this period the court held 13 status hearings to review N.S.'s welfare and to monitor the child's placement. Once discovered, the putative father was

given written notice of every hearing but repeatedly waived his right to be present. In the meantime, the mother was ordered to enroll in an alcohol recovery program, to seek individual counseling, and to comply with her parole conditions. But she instead became incarcerated for parole violations and upon being released resumed drinking.

On July 29, 2004, more than four years after the first report of harm, and after all rehabilitative efforts to reunite the child with her mother had failed, the court terminated the parental rights of N.S.'s mother and putative father. Pet. App. 23a-27a. The court then placed N.S. in the permanent guardianship of Hudson and Selina Sam, a couple who lived in the neighboring upriver village of Huslia. *Id.* N.S.'s mother and putative father were given written and verbal notice of the termination hearing. *Id.* The mother appeared telephonically but did not object to the termination. *Id.* The father again waived his right to be present. *Id.* at 24a.

In August 2005 the Sams petitioned the local Huslia Tribal Court to adopt N.S. But, because N.S. is a Kaltag tribal member, the Huslia Tribal Court forwarded the adoption petition to the Kaltag Tribal Court.

5. On October 14, 2005, the Kaltag Tribal Court issued an Order of Adoption declaring the Sams to be N.S.'s parents. *Id.* at 22a. In the same Order, the court ordered that N.S.'s name be changed to reflect her new parents' name, and directed that this be reflected on a new birth certificate. *Id.* The clerk of the

court then entered and submitted a Report of Adoption on a state adoption form to the Alaska Bureau of Vital Statistics, requesting a new birth certificate for N.S. *Id.* at 5a.

On January 26, 2006, the Alaska Bureau of Vital Statistics rejected the request. Referencing the Renkes Opinion, the Bureau explained: "As of October 25, 2004, the Bureau will only be accepting Tribal Court granted adoption paperwork from the following 3 entities: Barrow, Chevak, and Metlakatla." *Id.* Kaltag then brought this suit in federal court to compel the State to give full faith and credit to Kaltag's adoption decree under the ICWA's full faith and credit provision, 25 U.S.C. § 1911(d).

B. The Proceedings Below

The specific question addressed by the district court was whether, pursuant to § 1911(d) of the ICWA, the State must give full faith and credit to an ICWA adoption decree[5] where the adoptive parents are Indians from a neighboring Tribe who voluntarily invoked the jurisdiction of the Tribe in which the child was a member. In the district court, petitioner argued that in the absence of an Indian reservation or other form of "Indian country," a Tribe possesses no

[5] A "child custody proceeding" is defined under 25 U.S.C. § 1903(1)(iv) of the ICWA as including "'adoptive placement' which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."

jurisdiction to initiate proceedings in a tribal court over a member child, including voluntary adoption proceedings. In other words, under petitioner's changed policy the Tribe could only exercise jurisdiction over an adoption case if the case were commenced in state court and then transferred to the tribal court -- the tribal court would apparently have inherent jurisdiction to *receive and adjudicate* a transferred case, but not to *commence* such a case *ab initio*. Importantly for purposes of the Petition, in the district court petitioner never even mentioned, much less raised, the purported rights of the absent putative Indian father who repeatedly declined to be involved, nor of the Indian adoptive parents who are plaintiffs.

C. The Decisions Below

Relying in part on this Court's holding that § 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation," *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989), the district court found petitioner's interpretation of § 1911(b) strained." Pet. App. 14a-15a. "It would be incongruent for this court to find that [§ 1911(b)'s] 'presumptively tribal jurisdiction' requires the Tribe to first defer jurisdiction to the state court, and then wait for the state court to transfer the matter to tribal court." *Id.* The district court rejected petitioner's claim that a Tribe lacks all jurisdiction to adjudicate a child protection proceeding outside of Indian country involving

a tribal child. *Id.* at 17a (citing *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 599 n. 2 (9th Cir. 1991) ("A tribe's authority over its reservation or Indian country is incidental to its authority over its members.")). The district court concluded that for purposes of such jurisdiction, "it is the membership of the child that is controlling, not the membership of the individual parents." Pet. App. 17a. (citing *John v. Baker*, 982 P.2d 738, 759 (Alaska 1999), *cert. denied* 528 U.S. 1182 (2000) ("A tribe's inherent sovereignty to adjudicate internal domestic custody matters depends on the membership or eligibility for membership of the child.")).

A unanimous panel affirmed in a brief unpublished memorandum opinion. Pet. App. 2a-3a. The court of appeals agreed with the district court's decision that under § 1911(d) of the ICWA, "full faith and credit" must be given to the Kaltag Tribal Court's adoption decree, finding this conclusion compelled by that court's binding precedent in *Venetie*. *Id.* Petitioner sought en banc review but failed to receive a single vote.

REASONS FOR DENYING THE PETITION

1. In an effort to amplify the appellate court's decision to one of extraordinary import, petitioner grossly mischaracterizes the jurisdictional consequences of the appellate court's decision. The decision does not shift to Indian Tribes jurisdiction over "matters traditionally reserved to the States." Pet. 10.

Instead, the decision confirms the longstanding principle that tribal courts possess jurisdiction, at all times *concurrent* with state courts, to initiate child custody proceedings outside Indian country to protect children of the Tribe. As petitioner itself recognized prior to its sudden about-face in 2004:

> *[R]ecognition of concurrent jurisdiction between state and tribal courts provides improved access to judicial resolution of parental custody disputes, especially for rural Alaskans.* When coupled with the newly articulated comity criteria, it will also reduce parents' forum shopping in these cases. The Alaska Supreme Court's comity holding is thus an appropriate state law accommodation of the State's efforts to enhance cooperation between state and tribal court systems in Alaska.

Brief for the State of Alaska as Amicus Curiae in Support of Respondent at 8-9, *Baker v. John*, 528 U.S. 1182 (2000) (No. 99-973) (emphasis added).

Petitioner incorrectly states that "[a]t no point during this time was the State of Alaska made aware of these tribal court proceedings," Pet. 8, implying that had they been "made aware" they would have contested the Kaltag Tribe's jurisdiction. This, too, is not correct: the record shows plainly that the State was actively aware of the proceedings as early as 2000, when a state DFYS case worker "was in Kaltag and found [G.S.] passed out at the home of [A.C.] and was unable to wake her." Resp. App. 6. The district court found that "[i]ndeed, in this case the state CINA

office was notified; however what resulted from that notification is unclear." Pet. App. 15 n. 21. In addition, the mother's criminal conduct and her subsequent parole violations, resulting in reincarceration by the State during this same period, were all issues of which state corrections officers were well aware – including some of the same officials who were in active communication with the Kaltag Tribal Court. *N.S.*, Order Granting Temporary Custody at 2 (Dec. 14, 2000). The State also admitted that "it is true that DHSS received some reports of harm concerning N.S. in 2003." Appellants' Opening Brief at 40 n. 105, *Kaltag Tribal Council v. Karleen Jackson*, No. 08-35343 (9th Cir. filed Aug. 8, 2008). Although petitioner was therefore well apprised of the danger to Baby N.S. and of the on-going tribal court proceedings, it chose to defer to the Kaltag Tribal Court. Having chosen not to proceed then, petitioner should not be heard now to complain that there was a jurisdictional defect in the Tribal Court proceedings. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument that was "inadequately preserved in the prior proceedings"). In short, petitioner's 2004 change of position does not create a conflict worthy of this Court's review.

2. Petitioner wrongly argues that the appellate court's decision conflicts with the decisions of this Court barring "the extension of tribal civil authority over nonmembers on non-Indian land." Pet. 3 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2722 (2009) (internal

quotation marks omitted) (quoting *Nevada v. Hicks*, 533 U.S. 353, 360 (2001))). Neither *Hicks* nor *Plains Commerce* suggest that Tribes lack authority concurrent with the States to initiate and adjudicate child protection proceedings over member children, over the consenting parents of such children, or over the consenting adoptive parents of such children. In *Hicks*, this Court barred a tribal court tort action against state law enforcement officers for actions taken while executing a search warrant involving an off-reservation crime because the actions of state officers investigating a state crime were not "connected to that right of the Indians to make their own laws and be governed by them." *Hicks*, 533 U.S. at 361. In doing so this Court carefully distinguished tribal court involvement in those activities that might interfere with tribal authority, including the right "to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Id.* at 360-61 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (internal quotation marks omitted) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981))). Petitioner simply ignores this inconvenient aspect of *Hicks*, just as petitioner ignores this Court's cautionary language in *Hicks* that the Court's "holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law." 533 U.S. at 358 n. 2. As for *Plains Commerce*, there this Court limited the ability of tribal courts to adjudicate *adversarial* proceedings arising out of commercial real estate transactions between non-members

arising on fee lands. 128 S. Ct. at 2714 ("This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals."). That proposition, too, has nothing to do with this case.

Petitioner's analysis mistakenly merges the general proposition in Indian law that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *id.* at 2720 (internal citation omitted), with the incorrect assertion that a Tribe's jurisdiction over its members is per se restricted to the confines of Indian country, even when the matter at issue involves a tribal child, and even when the non-members from another Tribe *voluntarily invoke* the Tribe's jurisdiction over the child. As the court of appeals correctly explained, in such circumstances "[r]eservation status is not a requirement of jurisdiction because '[a] Tribe's authority over its reservation or Indian country is incidental to its authority over its members.'" Pet. App. 2a-3a (quoting *Venetie*, 944 F.2d at 559 n. 12); *see also* Mack T. Jones, Note, *Indian Child Welfare: A Jurisdictional Approach*, 21 ARIZ. L. REV. 1123, 1139 (1979) ("[J]urisdiction hinges upon the ethnic identity and tribal membership of the child, rather than the geographical location of the child's domicile. This reflects Congress' recognition of the fact that tribal ties extend beyond the boundaries of the reservation."); FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 7.02[1][c], pp. 1602-03 (2005 ed.) (hereinafter COHEN) ("Tribal court subject matter jurisdiction over actions arising outside Indian country extends . . . to cases involving the internal concerns

of tribal members, *and also to cases involving non-members who have consented to tribal jurisdiction.*") (emphasis added).

Congress agrees. As a result, statutes like the ICWA focus on the child's tribal membership as the determining factor in defining tribal jurisdiction. 25 U.S.C. § 1903(4) (defining "Indian child" as a child who is a tribal member or eligible for membership). Petitioner's assertion that the ICWA's jurisdictional scheme was intended as a limit on tribal jurisdiction in favor of state authority is contrary to the statute's purpose and over two decades of jurisprudence recognizing that "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. More specifically, its purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989) (emphasis in original) (internal citations omitted).

As the leading Indian law treatise observes, the ICWA's purpose in placing limits on state courts "is inescapable from a reading of the entire statute, the main effect of which is to curtail state authority." COHEN § 11.01[1], at 802 n. 2 (citing 25 U.S.C. §§ 1901, 1911-1916, 1918). Rather than conflicting with decisions of this Court, the appellate decision is fully *in accord* with this Court's holding in *Holyfield*, 490 U.S. at 36, that the ICWA "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation," a recognition that was hardly "*dicta*," Pet. 24 (emphasis added),

since it was critical to the Court's analysis of the entire jurisdictional question presented. Further, it is supported by a long line of authority going back nearly a century and holding that Indian Tribes possess inherent authority to regulate the conduct of their members in child welfare and other domestic relations matters. *See Holyfield*, 490 U.S. at 42 ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA. Indeed, some of the ICWA's jurisdictional provisions have a strong basis in pre-ICWA case law in the federal and state courts."); *United States v. Quiver*, 241 U.S. 602, 603-04 (1916) ("At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated . . . according to their tribal customs and laws."). This is because the power of an Indian Tribe to determine questions of internal relations derives from the essential character of the Tribe as a distinct political entity. *See, e.g., Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390 (1976) (*per curiam*) (recognizing that the jurisdiction of a tribal court "does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the [Tribe] under federal law"). Membership in a Tribe thus provides the necessary predicate for both tribal jurisdiction over tribal members and tribal jurisdiction over the subject matter of member domestic relations. *See Holyfield*, 490 U.S. at 42 (exclusive tribal jurisdiction over off-reservation Indian children based both on mother's domicile and on children's eligibility for membership in the Tribe).

Child welfare matters lie at the core of tribal sovereignty – a Tribe's inherent power to "determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana*, 450 U.S. at 564 (internal citations omitted). Congress agrees, recognizing in the ICWA that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). Decisions of this Court fully support the proposition, reaffirmed below and acknowledged by the Alaska Supreme Court in *John* and *C.R.H.*, that Alaska Tribes possess the authority to govern their own internal relations – and specifically to address the welfare of endangered tribal children – even when they do not occupy Indian country. WILLIAM C. CANBY, AMERICAN INDIAN LAW 463 (5th ed. 2009) ("The *John* case . . . leaves the Alaska Court more closely in line with federal court decisions.").

2. Nor does the court of appeals decision conflict with three decisions from other circuits, notwithstanding petitioner's selective quotation from all three. Pet. 20. None of these cases have anything to do with the question presented here and addressed by the panel below. *See Nord v. Kelly*, 520 F.3d 848, 851-52 (8th Cir. 2008) (whether tribal court could entertain claims brought by non-Indian against non-member Indian arising out of accident on state highway

within reservation); *MacArthur v. San Juan County*, 497 F.3d 1057, 1060-61 (10th Cir. 2007) (whether tribal court could entertain suits involving tort and civil rights violations brought by member and non-member Indians against non-member employers); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1089 (8th Cir. 1998) (whether tribal court could entertain suit contesting Breweries' use of the Crazy Horse name in the off-reservation manufacture, sale, and distribution of Crazy Horse Malt Liquor). All these cases, like *Hicks* and *Plains Commerce*, involved adversarial proceedings in tribal courts against non-Indians arising out of commercial dealings or tort actions. They have nothing to do with a consensual adoption case or a consensual termination proceeding.

With respect to the question actually addressed by the court of appeals here, the decision is fully *in accord* with the precedent of other Circuits. *See, e.g.*, *In re Larch*, 872 F.2d 66, 69 (4th Cir. 1989) ("[The ICWA] discloses that Congress recognized that there can be concurrent jurisdiction in state and tribal courts"); *AFL-CIO v. United States*, 195 F.Supp.2d 4, 21 (D.D.C. 2002), *aff'd* 330 F.3d 513 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1088 (2003) (recognizing Alaska's Tribes' sovereign status and noting *Venetie*'s holding "requiring Alaska to give full faith and credit to child custody determinations made by tribal courts of the native villages"); *cf. In re M.A.*, 137 Cal.App.4th 567, 574 (Cal. Ct. App. 2006) ("Public Law 280 . . . grant[ed] the state *concurrent*, not exclusive, jurisdiction," and citing *Venetie*) (emphasis in original).

As for state cases, petitioner's reliance on *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002), Pet. 21, is likewise inapposite, for that case involved a putative father's collateral attack on a twelve-year-old *state* court judgment of paternity, not the validity of a tribal court decree. To the contrary, in upholding the state court's concurrent jurisdiction to determine paternity where conception may have occurred on-reservation and the father resided off-reservation, the court repeatedly cites approvingly to *John* and other cases recognizing that "[o]utside Indian country . . . the state *as well as the tribe*, can adjudicate such disputes in its courts." *Id.* at 578-80 (emphasis added) (also citing Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. Rev. 1051, 1082 (1989) ("[W]ith respect to claims that have significant off-reservation impact or occur off-reservation, state courts may assert jurisdiction, *concurrent with tribal courts*, even as to actions involving Indian defendants.") (emphasis added)).[6]

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[6] *See also, In re Laura F.*, 83 Cal.App.4th 583, 593-94 (Cal. Ct. App. 2000) (where Indian children are "neither domiciled nor residing within any reservation of the Tribe," then "either the juvenile court or the Tribe could conduct such proceedings"); *In re Adoption of S.S.*, 657 N.E.2d 935, 942 (Ill. 1995) (Section 1911(b) "confers concurrent jurisdiction on the State courts along with the tribal court where the child is not domiciled and does not reside on the reservation. Under section 1911(b), there is still a presumption that the tribal court should hear the case"); *Adoption of Arnold*, 741 N.E.2d 456, 461 (Mass. App. Ct. 2001) ("If a child is not domiciled on a reservation, then State

(Continued on following page)

Similarly inapposite is petitioner's reliance on *In re Guardianship of D.L.L. and C.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980). Pet. 21. Indeed, *D.L.L.* actually *supports* the proposition repeated by the court of appeals here and in *Venetie*, and by the Alaska Supreme Court in *John*, that Tribes possess membership-based, non-territorial jurisdiction, concurrent with the State, over children's proceedings involving the welfare of tribal children. *D.L.L.*, 291 N.W.2d at 281 ("Even though a member of an Indian tribe may be outside the territorial boundaries of the reservation, the tribal government may regulate the absent member's affairs involving questions of . . . domestic relations.") (internal citation omitted).[7]

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and tribal courts have concurrent jurisdiction, and a State court is required to notify the tribe if it has reason to believe that the custody proceedings involve an Indian child."); *Spear v. McDermott*, 916 P.2d 228, 234 (N.M. Ct. App. 1996) ("It is undisputed that, at the time the abuse and neglect proceedings began in the children's court, the twins and their mother were both residing in and domiciled in New Mexico, rather than in the Cherokee Nation. Under those circumstances, the children's court had concurrent jurisdiction over the case, sharing that jurisdiction with the Cherokee tribal court.") (citing § 1911(b)).

[7] The court of appeals' decision is also in accord with other state appellate courts that have examined the nature of tribal sovereignty over members situated outside Indian country. *See, e.g., In re Appeal in Pima County Juvenile Action*, 635 P.2d 187, 191-92 (Ariz. Ct. App. 1981), *cert. denied sub nom. Catholic Soc. Servs. of Tucson v. P.C.*, 455 U.S. 1007 (1982) (finding that the Arizona trial court "should have deferred to tribal jurisdiction" and transferred the case to the tribal court in Montana even though the child was living in Arizona with the prospective adoptive parents at the time of the child custody proceeding); *cf.*

(Continued on following page)

At the very least, denying certiorari now would allow further development of the law, which would only benefit this Court should a conflict ever develop. Indeed, in the recently-argued *Tanana* case, *Native Village of Tanana v. State*, No. 3AN-04-1214 CI, slip op. (Ak. Sup. Ct. May 25, 2007), *appeal argued*, No. S-13332 (Alaska Dec. 10, 2009), the Alaska Supreme Court is currently considering the *identical* issue presented here. *See, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 23 n. 1 (1995) (Ginsberg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."). A decision in *Tanana* is expected shortly.

4. The precise question decided below concerned whether Alaska must give "full faith and credit"

Wisconsin Potowatomies of the Hannahville Indian Cmty. v. Houston, 393 F.Supp. 719, 730 (W.D. Mich. 1973) (holding that child custody proceeding for three orphaned children of an Indian father and non-Indian mother was within the jurisdiction of the tribal court, not the state court, even though the children were not residing on the reservation at the time: "If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a sine qua non to the preservation of its identity."); *Wakefield v. Little Light*, 347 A.2d 228, 237-38 (Md. 1975) (holding that the tribal court for the Crow Indian reservation in Montana had jurisdiction over a child living in Maryland and not present in Indian country).

under § 1911(d) of the ICWA to "any action resulting in a final decree of adoption," § 1903(1)(iv), where the adoptive parents are non-member Indians who invoked the Tribe's jurisdiction over a member child. This question was correctly resolved in *Venetie* in favor of tribal jurisdiction, concurrent with state jurisdiction, and has been settled law in both state and federal courts for two decades.[8] This Court denied certiorari to review the same issue in *John*, this Court denied certiorari on the same issue in *Doe*, and absolutely nothing has changed to warrant a different result here. While petitioner contends without support that the appellate court's decision is based on a

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[8] *See, e.g., Doe v. Mann*, 415 F.3d 1038, 1063 n. 32 (9th Cir. 2005), *cert. denied* 547 U.S. 1111 (2006) ("This question [regarding concurrent state/tribal jurisdiction] was resolved by our decision in [*Venetie*], which held that Public Law 280 states have only concurrent jurisdiction with the tribes over child custody proceedings involving Indian children."); *United States v. Stone*, 112 F.3d 971, 973 (8th Cir. 1997) ("Broadly put, [Public Law 280] gave to certain enumerated states concurrent jurisdiction over criminal and civil matters involving Indians, where jurisdiction had previously vested only in federal and tribal courts.") (quoting *Venetie*, 944 F.2d at 555 n. 8); *Confederated Tribes of Colville Reservation v. Sup. Ct. of Okanogon County*, 945 F.2d 1138, 1140 n. 4 (9th Cir. 1991) (recognizing *Venetie*'s holding that Public Law 280 did not divest tribal courts of concurrent jurisdiction over child custody matters); *In re Marriage of Skillen*, 956 P.2d 1, 18 (Mont. 1998) (holding that "when an Indian child resides off the reservation, the state court and tribal court share concurrent jurisdiction"); *State v. Schmuck*, 850 P.2d 1332, 1343-44 (Wash. 1993) (extensively examining *Venetie* and agreeing that under Public Law 280, state and tribal jurisdiction are concurrent).

fundamentally flawed interpretation of the ICWA, this Court's holding in *Holyfield*, that the ICWA establishes "concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation," 490 U.S. at 36, coupled with the absence of any dissenting opinion from *any* member of the court of appeals, confirms that the decision below represents a straightforward application of the well-accepted principle that Tribes possess *concurrent* jurisdiction to initiate and adjudicate matters concerning member children residing outside Indian country, and that §§ 1911(b) and 1918 of the ICWA do not bar Tribes from exercising their concurrent jurisdiction until (1) a state court case is first commenced from which a transfer may be requested, or (2) the Secretary grants a special reassumption petition.

Lacking the traditional reasons for granting certiorari, petitioner devotes a significant amount of its effort to hypothetical problems that may arise if tribal courts are permitted to exercise jurisdiction in child protection cases. It is striking that petitioner must rely exclusively on hypothetical harms, even though the rule petitioner challenges has been in place for nearly 20 years. If any of those untoward effects were more than theoretical, they would have occurred by now. The fact that they have not arisen merely reflects the cooperative and collaborative efforts of both the tribal and state judiciaries to protect the best interests of the children of the State of Alaska. The success of those efforts provides a powerful reason for this Court not to intervene.

If the hypothetical issues identified by the State ever materialize, then the Court could seriously consider whether its intervention is warranted. In the meantime, the Court should deny certiorari here as it has for the past two decades on the same issue.[9]

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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[9] Amici's brief illustrates well that the state courts are available to entertain any such issue, as recently occurred with the dismissal of Amicus Taylor's case, *see Evansville Village v. Donielle Taylor*, No. 4FA-10-1226 CI, Order (Ak. Sup. Ct. Mar. 23, 2010) (dismissing action), underscoring that this Petition is not the place to resolve those still developing cases.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KALTAG TRIBAL COUNCIL, and HUDSON AND SALINA SAM, Plaintiffs, vs. KARLEEN JACKSON, in her official capacity as Commissioner of Alaska Department of Health and Social Services; BILL HOGAN, in his official capacity as Deputy Commissioner of Alaska Department of Health and Social Services; and PHILLIP MITCHELL, in his official capacity as Section Chief of the Alaska Bureau of Vital Statistics, Defendants.	)	Case No. 3:06-CV-00211 (TMB)

DEFENDANT'S RESPONSE TO PLAINTIFFS' FIRST DISCOVERY REQUEST

[Dkt. 30, exh. 7, filed May 15, 2007]

The defendants, by counsel, respond to plaintiff's first discovery request as follows:

INTERROGATORIES

Interrogatory No. 1: Please state whether at any time prior to October 1, 2004, the Alaska Department of Health and Social Services and/or the Alaska

Bureau of Vital Statistics extended full faith and credit pursuant to 25 U.S.C. § 1911(d) of ICWA to a Tribal adoption decree from a federally recognized Tribe. If so, state the name of the tribe and whether a new birth certificate was issued to the adoptive child/children.

RESPONSE: The Alaska Bureau of Vital Statistics ("Bureau") has no easy way to determine if any certificate has been issued. Therefore, the response to this question is based on a review of Tribal adoptions processed during this time period. Since the Bureau did not start extending full faith and credit pursuant to 25 U.S.C. § 1911(d) of ICWA to a Tribal adoption decree until sometime after 2000, the search for Tribal and cultural adoptions was limited to those processed between January 1, 2000, and September 30, 2004. The list below only includes Tribal adoption decrees that were submitted on the Report of Adoption form used by state courts, i.e., the ones that were given full faith and credit; it does not include cultural adoptions submitted on forms as specified under 7 AAC 05.700.

Tribal Adoptions Processed

Village	Adoptions Processed
Akiachak	4
Akiak	4
Allakaket	1
Barrow	4
Brevig Mission	2
Chefornak	6
Copper Center	2

Goodnews Bay	4
Hooper Bay	21
Hughes	1
Kaltag	1
Kanatak	5
Kasigluk	1
Kenai	1
Kivalina	1
Knik	1
Kotlik	13
Kotzebue	16
Little Diomede	2
Manokotak	1
Metlakatla	2
Minto	1
Mountain Village (Asa Carsarmuit)	3
Napakiak	2
Nenana	1
Newtok	2
Nikolai	1
Noatak	8
Noorvik	7
Nulato	4
Orutsararmiut [sic]	1
Rampart	1
Ruby	1
Savoonga	8
Scammon Bay	1
Selawik	4
Shaktoolik	1
Shishmaref	1
Sitka	4
Stevens Village	6
Tanana	1

Togiak	1
Venetie	1
Wales	2
Yupit of Andreafski	1

Request for Admission No. 1: Please admit or deny that the Native Village of Kaltag, of which the Katag [sic] Tribal Council is the governing body, is a federally recognized Tribe and thus an "Indian Tribe" within the meaning of 25 U.S.C. § 1903.

RESPONSE: Admit

* * *

Request for Admission No. 3: Please admit or deny that you gave full faith and credit to Tribal adoption decrees from the Native Village of Venetie and/or Fort Yukon prior to October 1, 2004.

RESPONSE: Admit

Dated this 2nd day of April 2007.

TALIS J. COLBERG
ATTORNEY GENERAL

KALTAG TRIBAL COURT
KALTAG, ALASKA

In the Matter of:	**Case No. 00-0611**
[N.S.]	Tribal Court Phone Number: (907) 534-2243
[Date Of Birth Omitted]	
Minor Tribal Member	

ORDER GRANTING TEMPORARY CUSTODY

The Kaltag Tribal Court held a hearing on September 6, 2000, in accordance with the Order for Emergency Custody dated September 3, 2000. After considering all the evidence available, this Tribal Court finds that the welfare of the child, [N.S.], is endangered if temporary legal custody is not taken by the tribal court.

The Tribal Court HEREBY FINDS:

1. The mother of the child, [G.S.], is a Kaltag tribal member. Under the tribal constitution of Kaltag this child is a Kaltag tribal member under the jurisdiction of the Tribal Court and eligible to apply for enrollment; and

2. [A.E.], the Kaltag TFYS [tribal social worker], reviewed the case. She stated that she had received a report from the Health Aide, Dora Nickoli, on Saturday, September 2, 2000 that the above named child was in her mother's home with intoxicated adults. Ms. [E.] and the Mental Health Counselor, [V.B.], went to the home of [G.S.] to check on the welfare of this child and

found the home appeared to be occupied, but nobody responded, and the door was locked. The following day, Sunday, September 3, 2000, Ms. [E.] did another child safety check at the home and found that the mother was intoxicated and unable to communicate or care for the child. The child was in a diaper that smelled strongly of urine, she had a raw neck, and a bruise on her right cheek. When changing the child's diaper, there was dried feces on her bottom from having had a diaper changed without being cleaned, and a rash resulted. After contacting four Tribal Court Judges, Ms. [E.] carried out the decision of the Tribal Court to take Emergency custody of this child. The Health Aide was called to do a check up on the child, which occurred later that day. The child was placed into the physical custody of [L.S.]. The mother was not seen on Monday, September 4, 2000. On Tuesday, September 5, 2000, the DFYS Worker from Galena, Mark, was in Kaltag and found the mother, [G.S.], passed out at the home of [A.C.] and was unable to wake her. When the TFYS, [A.E.], tried to locate [G.] on the morning of this hearing, Ms. [S.] was not home. [A.C.] called the office and stated that [G.] was at her home and was still drinking, and Ms. [S.] was scaring Ms. [C.]. Ms. [E.] suggested that Ms. [S.] go to the clinic; and

3. Earlier in the summer, Ms. [B.] and Ms. [E.] visited the home after receiving the report on June 10, 2000 and found the mother of this child, [G.S.] passed out at noon. The child was placed in the care of [V.B.] after four Tribal Council members had been contacted regarding the

emergency. The mother was intoxicated that evening when visited again. The child was placed out of home for two weeks at that time and custody was relinquished by the Tribe and given back to the mother; and

4. The mother of the child, [G.S.], was given written notice of this hearing and was present at this hearing. She was not feeling well and was still intoxicated. She stated that she was too sick to speak to the Court at this time; and

5. The father of this child is unknown; and

* * *

7. The Kaltag TFYS, [A.E.], stated that if this child is placed out of home by the Court, that she does not have another home ready for the child, but will look into that if the court decides to keep the child out of the home at this time.

The Tribal Court CONCLUDES:

1. This child is a child in need of aid and should be made a ward of this court; and

2. It is in the best interest of the child for the village to take temporary legal custody of her in order to secure her care; and

3. It is in the best interest of the child to place her in the temporary physical custody of [L.S.] until the child can be escorted to Nulato to be placed in the temporary physical custody of [G.] and [J.S.], maternal uncle of the child and his wife. This child shall be placed in an out-of-home placement for sixty (60) days; and

4. It is in the best interest of this child that the mother, [G.S.], stop drinking alcohol and remain sober for the safety and well being of herself and this child; and

5. It is in the best interest of the child for the Kaltag TFYS, [A.E.], and the TCC Social Worker, Mishal Gaede, to monitor her well being, and to secure Foster Care funds for her if applicable.

The Tribal Court THEREFORE ORDERS:

1. The Kaltag Tribal Court takes temporary legal custody of the child, [N.S.], and makes her a ward of this court; and

2. The physical custody of the child is temporarily granted to [L.S.] until the child can be escorted to Nulato to be placed in the temporary physical custody of [G.] and [J.S.], maternal uncle of the child and his wife. [G.] and [J.S.], maternal uncle of the child and his wife, will be granted physical custody for the remainder of the next sixty (60) days, through November 6, 2000, during which time they shall exercise full powers of guardianship; and

3. The tribal court requests the mother of the child, [G.S.], to become sober, to remain sober, and to immediately make an appointment with [V.B.] for alcohol screening and a recommendation for either residential treatment or local counseling, and to provide the court with documentation of counseling through a signed release of information; and

4. The Tribal Court requests that the Kaltag TFYS, [A.E.], visit the home of [G.S.] weekly and offer services as needed; and

5. The Tribal Court requests that the Kaltag Counselor, [V.B.], forward her recommendation for this client to the TFYS, [A.E.], as soon as possible for the Court records; and

* * *

7. The Tribal Court requests that the Kaltag TFYS, [A.E.], and the TCC Social Worker, Mishal Gaede, monitor this case and pursue foster care funding if applicable; and

8. The tribal court will reconsider this matter in a hearing on November 6, 2000 to determine whether temporary custody by the court shall be extended for a period not to exceed one (1) year.

DONE BY TRIBAL COURT ACTION THIS 6th DAY OF SEPTEMBER, 2000.

/s/ Madeline Solomon
Presiding Judge

9-27-00
Date

KALTAG TRIBAL COURT
KALTAG, ALASKA

In the Matter of:	)	**Case No. 00-0611**
N.S.	)	Tribal Court Phone Number: (907) 534-2243
[Date Of Birth Omitted]	)	
Minor Tribal Member(s)	)	

ORDER GRANTING TEMPORARY CUSTODY

The Kaltag Tribal Court held a hearing on March 28, 2003. Present in Kaltag were John Madros, presiding judge, Jason Saunders, judge, Madeline Solomon, judge, Beverly Madros, judge, and Donna Esmailka, TFYS. Present telephonically from Fairbanks were [G.S.], mother, and Racquel Alcain, TCC Child Protection Program Coordinator. After considering all the evidence available, this Tribal Court finds that the welfare of the child, [N.S.], is endangered if temporary legal custody is not continued by the tribal court.

The Tribal Court HEREBY FINDS:

1. The mother of the child, [G.S.], is a Kaltag tribal member. Under the tribal constitution of Kaltag this child is a Kaltag tribal member under the jurisdiction of the Tribal Court and eligible to apply for enrollment; and

2. The putative father of the child, [A.L.], may be a Koyukuk tribal member. Under the tribal constitution of Koyukuk, this child may be a Koyukuk

tribal member and eligible to apply for enrollment; and

3. Court History: * * * After the December 14, 2000 hearing, at which time the mother was intoxicated and continued drinking for two days, she left for Fairbanks. Ms. [E.] reported that [G.S.] was incarcerated after leaving Kaltag. She spoke to Ms. [S.]'s Probation Officer, Reuben, and reported that he recommended that Ms. [S.] be ordered to long-term residential treatment. She would not be allowed back in the village of Kaltag until March or April of 2001 and there was a State Court hearing on the matter on January 13, 2001.

The December 14, 2000, the April 16, 2001 and the October 10, 2001 Court Orders included that the Tribal Court required the mother of the child, [G.S.], to become sober, to follow her aftercare plan and remain sober, and to immediately make an appointment for the FNA Women and Children's Recovery Program (WCRP), or another long-term treatment program, to seek individual counseling, and to provide the court with documentation of all services obtained through the North Star Center as well as documentation of applying to FNA WCRP through a signed releases of information. The child was placed with [J.] and [G.S.], maternal aunt and uncle to this child living in Nulato, but she was moved to Kaltag to the home of [L.S.], and then moved to the present home with the [M.]'s on November 2, 2001[.] The court was unable to hold a fall hearing until November 18, 2002. At that time, [G.] was incarcerated at Fairbanks Correctional

Center due to a parole violation. [N.] continued to be in the [M.] home and was doing well in their care. The court ordered the TFYS, Erica Solomon, to meet with [V.M.] to determine whether she would be interested in caring for [N.] permanently. A court hearing was to be scheduled in 30 days to determine the permanent plan for [N.]

4. The mother of the child, [G.S.], was given notice of this hearing and was present at this hearing. * * * She can't go to Kaltag until next year because that is where she committed her offense. She mentions that this is written in a letter from the parole board. She will bring the letter to Racquel at TCC so she can fax a copy to the tribal court. Her parole conditions include not drinking, working 40 hours a week, and completing a substance abuse aftercare treatment program.

* * *

5. The putative father of this child, [A.L.], was given written notice of this hearing and was not present at this hearing; and

* * *

7. Donna Esmailka, * * * stated that the previous TFYS, Erica Solomon, contacted [A.L.], the possible father. He was unable to take [N.] and didn't know if anyone from his family could take her. He called Donna today and said that he couldn't participate in the hearing because he is traveling. He didn't have any input to give for the hearing today.

* * *

The Tribal Court CONCLUDES:

1. This child is (a) child in need of aid and should be made a ward of this court; and

2. It is in the best interest of the child for the village to continue temporary legal custody of her in order to secure her care; and

3. It is in the best interest of the child to place her in the temporary physical custody of [V.M.] for the next 60 days; and

4. It is in the best interest of the child for the Kaltag TFYS, Donna Esmailka, and the TCC Social Worker, Racquel Alcain, to monitor her well being, and to secure Foster Care funds for her if applicable.

The Tribal Court THEREFORE ORDERS:

1. The Kaltag Tribal Court takes temporary legal custody of the child, [N.S.], and makes her a ward of this court; and

2. The physical custody of the child is temporarily granted to [V.M.] for 60 days, through May 28, 2003, during which time she shall exercise full powers of guardianship; and

3. The tribal court requires the mother of this child, [G.S.], to follow the conditions of her parole and to provide the court with documentation. The court also requests that she sign a release of information allowing the tribal court and TCC child protection program staff to obtain information from her parole officer; and

4. The tribal court requires the mother of this child, [G.S.], and the putative father, [A.L.], to sign an affidavit of paternity. The tribe requests that Racquel Alcain, TCC Child Protection Program Coordinator, assist the parents with completing this requirement.

5. The tribal court requires the putative father of this child, [A.L.], to provide Donna Esmailka, TFYS, with a list of relatives so that they may be considered for long-term placement of [N.].

6. The tribal court requires the foster parent, [V.M.], to contact the Kaltag Mental Health counselor and schedule an evaluation for [N.] to determine if ongoing counseling would be appropriate for her.

7. The court requires the Kaltag TFYS, Donna Esmailka, to complete two home visits per month with [V.M.].

* * *

9. The tribal court will reconsider this matter in a hearing on May 28, 2003, at 2:00 p.m. to determine whether temporary custody by the court shall be extended for a period not to exceed 90 days.

DONE BY TRIBAL COURT ACTION THIS 28th DAY OF MARCH, 2003.

/s/ John F. Madros Sr.
Presiding Judge

3-28-03
Date

Supreme Court, U.S.
FILED
SEP 8 - 2010
OFFICE OF THE CLERK

No. 09-960

In the Supreme Court of the United States

WILLIAM H. HOGAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ALASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

KALTAG TRIBAL COUNCIL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

In opposing certiorari, respondents focused their efforts on arguing that this case is not an appropriate "vehicle" to decide the undeniably important question presented. Opp.7. We explained why respondents were wrong in our reply brief in support of certiorari. And the government acknowledges that the question presented is squarely before the Court. Instead, the government argues that certiorari is unwarranted because (1) the Ninth Circuit's ruling that tribes have inherent sovereignty over child-custody proceedings involving nonmembers outside Indian country is correct, U.S.Br.8-14, and (2) there is no practical need for this Court's review, U.S.Br.18-22. Each of those arguments only underscores the case for certiorari. The government's defense of the Ninth Circuit rule is based on a far-reaching conception of tribal sovereignty that is sharply at odds with this Court's precedents and will have profound implications for Alaska. And the government's view of the situation from Washington, D.C. is drastically out of touch with the real world problems and confusion on the ground in Alaska.

ARGUMENT

A. THE GOVERNMENT'S MERITS DEFENSE UNDERSCORES THE NEED FOR REVIEW

1. It is not surprising that the government has recommended denial given its central "policy" objective of "supporting tribal justice systems." U.S.Br.1 (parenthetical). That objective has put the government on the losing side of most of the Court's recent tribal sovereignty cases. *See, e.g.*, U.S.Br. in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008); U.S.Br. in *Nevada v. Hicks*, 533 U.S. 353 (2001); U.S.Br. in *Atkinson Trading Co. v.*

Shirley, 532 U.S. 645 (2001); U.S.Br. in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In each case, this Court rejected the government's more expansive views concerning tribal sovereignty over nonmembers on reservations. *Plains Commerce*, 128 S. Ct. at 2721; *Hicks*, 533 U.S. at 359-65; *Atkinson Trading Co.*, 532 U.S. at 656-57; *Strate*, 520 U.S. at 456-59. What is remarkable about the government's position in this case is not that it supports the tribe, but how *far* it goes in propounding the scope of tribal sovereignty—over a nonmember, outside Indian country, to terminate parental rights—without even recognizing the novelty of the theory it advances.

2. a. As explained in the petition (Pet.16-18), this Court has consistently stressed that "the inherent sovereignty of Indian tribes" is "limited to 'their members and their territory,'" *Atkinson Trading*, 532 U.S. at 650, and repeatedly rejected "the extension of tribal civil authority over nonmembers on non-Indian land," *Plains Commerce*, 128 S. Ct. at 2722. The government argues that "[t]ribal jurisdiction over domestic relations" is immune from those fundamental limits because it goes to the "core" of the tribe's "retained sovereignty." U.S.Br.9. But this Court's precedents compel just the opposite conclusion.

This Court has already held that tribal sovereignty encompasses "domestic relations *among members*." *Montana v. United States*, 450 U.S. 544, 564 (1981) (emphasis added). And the case to which this Court has repeatedly cited to support that proposition involved an adoption proceeding where "*all* parties belonged to the Tribe and resided on its reservation." *Strate*, 520 U.S. at 458 (citing *Fisher v. District Court*, 424 U.S. 382, 386 (1976)) (emphasis added); *see Plains*

Commerce, 128 S. Ct. at 2718. Likewise, in the Court's only case concerning inherent tribal authority over adoptions outside Indian country, this Court refused to embrace the dissent's argument that ordinary tribal jurisdictional rules do not apply where the case "involves a problem of domestic relations." *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 465 n.8 (1975) (Douglas, J., dissenting).

Remarkably, although it relies on *Montana*, the government never even acknowledges *Montana*'s "domestic relations *among members*" rule, much less the facts of *Fisher* and *DeCoteau*. Instead, the government asserts that *its* rule that tribes have domestic relations authority over nonmembers outside Indian country is "longstanding" and "firmly rooted." U.S.Br.8-9. But the government fails to cite a single case from this Court supporting that proposition. Instead, all the cases the government cites involve situations in which all parties were tribal members and were domiciled on a reservation. U.S.Br.9; *see Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48-49 (1989); *Fisher*, 424 U.S. at 389; *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

b. The centerpiece of the government's argument is the proposition that the *Montana* framework provides the source of authority over nonmembers in this context. U.S.Br.11-12. But the *Montana* exceptions only "permit tribal regulation of nonmember conduct *inside the reservation*." *Plains Commerce*, 128 S. Ct. at 2721 (emphasis altered). This Court has never applied the exceptions to expand tribal authority over nonmembers *outside* Indian country. The tribe in this case—like virtually all 229 tribes in Alaska—lacks Indian country. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520

(1998). The government therefore proposes an unprecedented expansion of tribal sovereignty over nonmembers for nearly half the nation's Indian tribes.[1]

Further, *Montana* does not help the government anyway. The government invokes (Br.11-12) *Montana*'s second exception, which governs matters that "threaten[] ... the political integrity ... or the health or welfare of the tribe." 450 U.S. at 566; *see Strate*, 520 U.S. at 459. This Court has never found an assertion of tribal authority justified under that exception, and has stressed that the exception applies only when "necessary to avert catastrophic consequences." *Plains Commerce*, 128 S. Ct. at 2726. And it cannot seriously be argued that a tribe's ability to terminate the parental rights of a nonmember to enable the adoption of an Indian child domiciled outside Indian country by nonmembers who live in a different village is vital to tribal self-government.

c. Lacking support for its position in Indian law, the government turns to the rules governing adoptions in the inter-*State* context. U.S.Br.12-13. That argument only underscores how profoundly misguided the government's position is. First, analogizing the "Village of Kaltag" to a "home State" under child-

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[1] The government's reliance on *Montana* also flies in the face of lower court precedent. *See, e.g., Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998) ("Neither *Montana* nor its pregeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations."); *see also State v. Klamath Tribe*, 11 P.3d 701, 706 (Or. Ct. App. 2000); *Wright v. Colville Tribal Enter. Corp.*, 111 P.3d 1244, 1248 (Wash. Ct. App. 2005), *rev'd on other grounds*, 147 P.3d 1275 (Wash. 2006).

custody laws suggests that Kaltag has a territorial dimension to its sovereignty that it plainly lacks given the absence of Indian country. And second, analogizing the tribe to a State overlooks that—because "[t]ribal sovereignty ... is 'a sovereignty outside the basic structure of the Constitution'"—"[t]he sovereign authority of Indian tribes is limited in ways state ... authority is not." *Plains Commerce*, 128 S. Ct. at 2726 (quoting *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring)).[2]

3. The government argues that the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901, *et seq.*, "confirm[s]" its position on tribal authority over nonmembers. U.S.Br.9. Importantly, however, the government agrees with the parties that ICWA does *not* "grant" additional authority to tribes in this context. U.S.Br.10; *see* Pet.25 n.16. Accordingly, the tribal sovereign question presented turns on the *inherent* authority of the tribe. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (refusing to expand inherent authority of tribes to

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[2] The government argues that there is no conflict of authority among the lower courts. U.S.Br.14-18. That position follows largely from its mistaken reading of this Court's precedents and a selective reading of the lower court authority. *Compare, e.g., Roe v. Doe*, 649 N.W.2d 566, 576 (N.D. 2002) ("We recognize that Indian tribes retain their inherent power ... to regulate domestic relations among members. However, in this case Roe and Doe are not members of the same tribe.") (citation omitted). In any event, this case raises an issue of exceptional concern to Alaska and its people. Pet.10-15. The stark conflict between the Ninth Circuit ruling and this Court's decisions is alone more than sufficient to warrant certiorari. *Cf. Venetie*, 522 U.S. 520.

reach nonmembers in criminal context "absent affirmative delegation of such power by Congress").

ICWA establishes jurisdictional rules for managing authority—*when it otherwise exists*. Pet.22-25. The government points to legislative history suggesting that Section 1911(b) was intended to adopt "a modified doctrine of *forum non conveniens*, in appropriate cases." U.S.Br.10 (quoting H.R. Rep. No. 95-1386, at 21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530 ("1978 House Report")). But "the outset of any *forum non conveniens* inquiry" is a determination whether the alternative forum would have jurisdiction. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

The government's reliance (U.S.Br.9-10) on *Holyfield* is similarly misplaced. The fact that Section 1911(b) contemplates that there will be "concurrent jurisdiction" when a transfer is allowed—such as in the typical case in the Lower 48 States that Congress undoubtedly had in mind, where all parties to the proceeding are tribal members—does not answer the question whether tribes have inherent sovereignty over child-custody cases involving nonmember parents outside Indian country. Nor did *Holyfield*—a case in which *all* parties were tribal members domiciled on the reservation—address that issue. 490 U.S. at 37. The *dictum* in *Holyfield* on which the government relies therefore in no way supports its position that tribal sovereignty exists in the quite different situation here.

The government argues that ICWA's scheme "focuses on the status of the child" and that Congress did not carve an "*exception* based on the membership status of some other party." U.S.Br.12 (emphasis added). But Congress was free to base its rules managing jurisdiction—when it otherwise exists—based on any factor, including a child's status. The fact

that Congress chose to focus on this factor does not mean it intended to confer jurisdiction over nonmembers. Moreover, the government has it backwards: this Court's precedents require a tribe to identify an "affirmative delegation" by Congress of authority over nonmembers, *Oliphant*, 435 U.S. at 208; they do not adopt tribal sovereignty over nonmembers as a baseline to which Congress must make *exceptions*.

Finally, the government's efforts to wrap itself in ICWA is ironic given that its position would gut one of the important protections of the Act—an in-writing, court-recorded parental consent requirement (§ 1913(a)). The government suggests that the nonmember father did not "object[]" to the termination of his parental rights. U.S.Br.21. But one of the chief concerns that ICWA sought to address was the uninformed waiver of rights. Cert.Reply.10. And the government's attempt to equate a failure to object with informed consent epitomizes the mindset that Congress sought to eliminate when it enacted ICWA. This case was decided below on the premise that the nonmember father did *not* consent and, in any event, even the most informed consent is insufficient to confer subject-matter jurisdiction. Cert.Reply.9-11.

B. THE GOVERNMENT IS OUT OF TOUCH WITH THE REALITY IN ALASKA

The government also claims that certiorari is unwarranted because the State—and Alaskan families and children—have "no reason" to worry about the Ninth Circuit rule. U.S.Br.21. But the government's view of the issue from Washington, D.C. is starkly at odds with the reality 3000 miles away in Alaska.

The parties in this case and *amici* parents—who are far better situated to evaluate the situation in Alaska—

agree that the question presented is "one of extraordinary importance to Alaska." Opp.9; *see* Amicus.Br.6. Moreover, the government does not dispute the fundamental demographics in Alaska that guarantee this issue will constantly recur. Pet.10-15. More than 200 tribes are spread throughout Alaska. Relationships between members of different tribes or Natives and non-Natives are commonplace. And nearly 40% of Alaska Natives are minor children. The question presented thus affects potentially thousands of Alaskan children and families.

Two facets of Alaskan life underscore the far-reaching significance of the question presented. First, Alaskan Natives comprise a relatively large percentage of the entire population in Alaska (15.2%), U.S. Census Bureau, *Alaska Quick Facts* (2010)—much greater than the percentage of Native Americans in any other State. And second, most communities—whether urban centers or rural villages—are mixtures of Natives and non-Natives. Even Native villages are typically mixed communities. Pet.13. The entire fabric of Alaskan society, in other words, is different in ways that magnify the importance of this case.[3]

The government asserts that there are "no untoward consequences" from the Ninth Circuit's rule. U.S.Br.19. But the government simply shrugs off the adverse consequences spelled out in the petition, Pet.25-30, and ignores much of the evidence before the

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[3] Unlike *amici*, the State is not questioning tribal status. Pet.17 n.12. Indeed, the State is partnering with tribes and rural communities across Alaska. But that in no way diminishes the extraordinary importance of the question presented.

Court, including concerns about tribal court procedures in child-custody matters, Pet.27-28 nn.18-19, reports of tribes competing over jurisdiction, Pet.26 n.17, and graphic accounts of nonmember parents stripped of their children by tribal courts with little notice or process, Amicus.Br.2-6. Instead, the government asserts that there is no cause for concern because "tribes are often able to work cooperatively," and "do not *always* seek jurisdiction" in child-custody cases. U.S.Br.19-20. But that says nothing about the growing body of cases in Alaska—like this one—in which tribes *have* asserted jurisdiction and conflicts *have* arisen.

Evansville Village v. Taylor is just one example. There, the tribal court—headquartered in a village of *thirty* residents, only *fourteen* of whom are Natives—purported to extinguish a non-Native mother's custody of her daughter, even though the nonmember mother had sole custody from 2000 and lived with her daughter in Fairbanks, and the daughter was only one-sixteenth Native Alaskan. Amicus.Br.4-6. Pursuant to the tribe's order, the child was physically seized by Evansville Village. Respondents suggested that such conflicts are easily resolved by Alaska's courts. Opp.35 n.9. But the tribe has issued further orders since then in defiance of Alaska's courts, claimed that the "Fairbanks Police Department and the maternal parent are non-compliant," Add.2a, and asserted continued custody over the child. Similar occurrences are becoming commonplace. As recent tribal orders illustrate, tribes are asserting authority over child-custody proceedings when *neither* parent is a member and even when the *child* is not a member. Add.3a-10a.

The government's effort to turn the tables by suggesting that it is the involvement of *the State* in

these matters that is problematic is unavailing and remarkable in light of the State's sovereign *parens patrie* interest concerning Alaskan children. The State has a comprehensive child protective services system that exists to protect *all* children in Alaska, and the State is currently overseeing hundreds of cases in which a child is of mixed tribal heritage. Pet.4-5, 12. Likewise, the state courts are perfectly capable of adjudicating these disputes, no matter where they arise. But more fundamentally, the question is not which forum (tribal or state) is more *convenient*; it is whether a tribal court can subject nonmembers—who have no say in the tribe—to its jurisdiction. Pet.18.[4]

The government also suggests that the fact that nonmembers may object to jurisdiction in tribal court or invoke the Indian Civil Rights Act to protect their interests is a reason to dismiss the concerns with subjecting nonmembers to tribal jurisdiction. U.S.Br.21 n.8. This Court has seen—and rejected—this line of argument before. *Oliphant*, 435 U.S. at 211-12. And for good reason. Under the decision below, a tribe may simply dismiss such objections. And parallel state court litigation over the adequacy of tribal courts is precisely the kind of follow-on litigation that Alaska predicted would occur—requiring Alaska's courts to sort out the legitimacy of up to 229 different tribal court regimes as applied to particular cases, while prolonging child-custody disputes. Pet.29-30.

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[4] The government is wrong in suggesting (U.S.Br.21) that the State failed to respond appropriately in this case. Cert.Reply.11-12. And as is true for the federal government's own officers, state officials are entitled to a presumption of good faith and regularity.

Despite the urgent need for this Court's review, the government suggests (U.S.Br.17-18) that the Court should pass on this case and wait for *State v. Native Village of Tanana*, No. S-13332 (Alaska S. Ct.). But the *Tanana* case does not arise on any concrete set of facts, creating a serious impediment to judicial review of the context-specific tribal authority issue. Alaska.Br.10-14. Moreover, the absence of facts has led to a dispute over what *is* at issue. Notably, the trial court stated that its decision "addresses issues related to tribal members and *not* nonmembers," Order at 2, *Native Village of Tanana v. State*, No. 3AN-04-12194CI (Alaska Super. Ct. Dec. 8, 2008) (emphasis added), and the tribe has argued that there are no fewer than *four* reasons why the issue of tribal jurisdiction over nonmembers in child-custody proceedings "is simply not presented," Appellees.Br.33.

By contrast, this case undeniably presents the nonmember issue and arises on a concrete set of facts that the government acknowledges squarely presents the issue—making it an ideal vehicle for resolving the scope of tribal authority over nonmembers outside Indian country in child-custody cases. And in any event, nothing the Alaska Supreme Court says in *Tanana* can undo the Ninth Circuit precedent below.

The government has filed a brief squarely joining issue on the question presented and defending the Ninth Circuit's extraordinary conception of tribal sovereignty over nonmembers outside Indian country. Respondents are represented by expert counsel in Indian law matters. And the decision below is the product of a Ninth Circuit precedent that was wrong when it was decided nearly 20 years ago—and even more wrong today in light of this Court's subsequent cases. There is no reason to put off review of the

important question presented. Indeed, to do so will only exacerbate the confusion, uncertainty, and jurisdictional chaos currently facing Alaska.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ADDENDUM

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In the Matter of Skylair Childress, No. CT 10 004 SC, Order Following Review Hearing of Child in Need of Aid (Kenaitze Indian Tribal Ct. July 22, 2010) 7a

EVANSVILLE TRIBAL COURT
Evansville, ALASKA

In the Matter of:	)
	)
NAME:	)
Madison A Costello	)
	)
DOB:	)
8/12/1999	) Case No. 2010-01-09
	)
	) Tribal Court Phone Number
Minor Tribal Member	) (907) 692-5005

ORDER GRANTING TEMPORARY CUSTODY

The Evansville Tribal Court held a hearing on July 8th, 2010 AT 3:00 PM. After considering all of the available evidence, the Tribal Court finds that the safety and welfare of the child, Madison Arianna Costello, is endangered if the Tribe does not take continued temporary legal custody.

The Tribal Court HEREBY FINDS:

1. Madison A Costello is a minor Evansville Tribal Member and;
2. Evansville Tribal Family & Youth Services, the petitioner in the case, requests an extension from the Evansville Tribal Court to take legal custody over the child, and to place her in the physical custody of Tribal Family & Youth Services for a period of **120 days from July 8th, 2010**, at which point there will be a review hearing. The review Hearing is to be held **November 5th, 2010**.

3. There is cause for needed care from the Evansville Tribal Court and Evansville Tribal Family and Youth Services regarding the above named minor Tribal Member because, the Fairbanks North Star Borough School District, the Fairbanks Police Department and the maternal parent are non-compliant with the Tribal Court Orders set out from previous hearings; and the State of Alaska Office of Children's Services has been non-communicative and negligent towards this minor Tribal Member's health, safety and well-being.

The Tribal Court CONCLUDES:

1. The above named minor Tribal Member is a child in need of aid; and
2. It is in the best interest or the child for the Tribe to have continued temporary legal custody of her in order to secure her care; and
3. It is in the best interest of the child to remain in the temporary physical custody of Evansville Tribal Family & Youth Services for **120** days; and
4. It is in the best interest of the child for Evansville TFYS, to monitor the child's safety and well-being.

The Tribal Court ORDERS:

1. The Evansville Tribal Court will continue to have temporary legal custody of the child; and
2. The physical custody of the child is temporarily granted to Evansville Tribal Family & Youth Services for **120** days. During this time, the TFYS shall exercise full powers of guardianship, this includes medical, dental and academic

concerns and supervised visitation with parent; and

3. The Evansville Tribal Court requests that the Evansville TFYS, monitor this case; and
4. The Evansville Tribal Court requests that the Evansville TFYS and the TCC Child Protection Team work closely with OCS while there is an open case concerning the above named minor Tribal Member.
5. The Evansville Tribal Court will reconsider this matter in a hearing on **November 5th, 2010**, to determine whether temporary custody by the court shall be extended for a period not to exceed 120 days.

DONE BY TRIBAL COURT ACTION THIS 8th DAY OF JULY 2010.

[illegible]
Tribal Court Judge

07-14-2000
Date

ETC Order-2010-01-09

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA, on its own behalf and as *Parens partriae* on behalf of its members,	)	
Plantiff,	)	
v.	)	
STATE OF ALASKA, PATRICK S. GALVIN, in his official capacity of Commissioner of the Alaska Department of Revenue and JOHN MALLONEE, In his official capacity of Director of the Alaska Child Support Services Division.	)	Case No. IJU-10 -376 CI
Defendants.	)	

PLAINTIFF'S RESPONSES TO DEFENDANTS' FIRST AND SECOND SETS OF DISCOVERY REQUESTS

Plaintiff responds to defendants' first and second sets of discovery requests as follows:

* * *

RFA No. 6: Please admit that CCTHITA does not have subject matter jurisdiction to issue a child support order if one parent is a nonmember.

Response: Deny. The Tribe has inherent subject matter jurisdiction to issue valid child support orders for children who are members of the Tribe or eligible for membership in the Tribe.

RFA No. 7: Please admit that CCTHITA does not have subject matter jurisdiction to issue a child support order if the child's custodian is a nonmember.

Response: Deny. The Tribe has inherent subject matter jurisdiction to issue valid child support orders for children who are members of the Tribe or eligible for membership in the Tribe.

RFA No. 8: Please admit that CCTHITA does not have subject matter jurisdiction to issue a child support order if both parents are nonmembers.

Response: Deny. The Tribe has inherent subject matter jurisdiction to issue valid child support orders for children who are members of the Tribe or eligible for membership in the Tribe.

* * *

As to responses to requests for production, responses to requests for admission, and objections:

DATED this 19th day of August, 2010.

s/ Holly Handler
Holly Handler, Bar No. 0301006
ALASKA LEGAL SERVICES CORPORATION
419 Sixth Street #322
Juneau AK 99801
Phone: (907) 586-6425
Fax: (907) 586-2449

As to responses to interrogatories:

DATED this 19th day of August, 2010.

s/ Eddie Brakes
Eddie Brakes
CCTHITA Tribal Child Support Unit Manager

Subscribed to and sworn before me this 19th day of August 2010.

s/ Hollis L. Handler
Notary Public for the State of Alaska
My commission expires: 1-1-2011

[notary seal omitted]

THE KENAITZE INDIAN TRIBAL COURT IN AND FOR THE KENAITZE INDIAN TRIBE FIRST JUDICIAL DISTRICT OF KENAI CHILDREN'S DIVISION

[TRIBAL COURT SEAL OMITTED]

In the Matter of:	)
Skylair Childress	)
DOB: 04/08/96	)
	)
	)
Minors Under the Age	) Case No. CT 10 004 SC
Of Eighteen Years	)

ORDER FOLLOWING REVIEW HEARING OF CHILD IN NEED OF AID

1. This matter came before the Kenaitze Tribal Court on July 22, 2010 at 3:20 p.m. This hearing took place in front of Tribal Court Judges Rita Smagge, Mary Ann Mills and Rusty Swan. Court Clerk, Annette Schultz, Tribal Court Liaison, Nate Esteban and CASA Kym Miller were also present in the courtroom.
2. The above name-child (Skylair) is not a Kenaitze Tribal Member nor is his Mother (Nancy Childress) who is deceased and Father (Jorge Morena Jr.). Skylair is a member of The Native Village of Kotzebue IRA. At this time Skylair lives with his Maternal Grandparents Rhoda and Gary Dailey whom are being enrolled with The Native Village of Kotzebue IRA. The Kenaitze Tribal Court received a letter from The Native

Village of Kotzebue IRA asking the Kenaitze Tribal Court to take jurisdiction of this case. Therefore the Court has jurisdiction over the above named minor under the Kenaitze Indian Tribe Domestic Relations Code Chapter 1 Sections 2 (A) (1) and (2).

3. Mrs. Dailey and Mr. Dailey were noticed of this hearing on July 8, 2010 by mail.

4. The hearing was recorded by a digital recording device. Mrs. and Mr. Dailey were present in the courtroom for the hearing and testified. The following people testified: Nate Esteban (Tribal Court Liaison) and Kym Miller (CASA).

5. The purpose of the hearing on July 22, 2010 was a review hearing.

6. Kym Miller testified that Skylair is set up for counseling at Nakenu Family Center. She stated Skylair is still requesting to live with his step father, Mathew Grant. There has been no more contact between Skylair, Mr. Grant and Mr. Morena. Mrs. Miller also stated the account at AK USA has been closed.

7. Nate Esteban testified that he received a copy of the actual resolution from the Native Village of Kotzebue. He stated Skylair is scheduled to start therapy on July 29th at Nakenu Family Center. Mr. Esteban also stated he sent petitions to Mr. Grant and Mr. Morena for them to fill out so they can become parties to the case; he has not yet received the petitions.

8. Mr. Dailey testified he has told Skylair he is not going to live with Mr. Grant. Mr. Dailey stated he don't think he will see Mr. Grant, he is not

welcome here. He stated they are waiting for Skylair to see a therapist.

9. Mrs. Dailey testified she still wants to raise Skylair.

10. The Court finds that it is in the best interest of the above-named child to be under Guardianship of his Grandmother Mrs. Dailey and Grandfather Mr. Dailey at this time. The child's mother past away and the father has not been part of his life.

11. The Court finds that based on the testimony presented that Skylair is a Child In Need of Aid pursuant to the Domestic Relations Code Chapter 2 Section 6.

IT IS HEREBY ORDERED

1. The above named child is placed in temporary custody of the Kenaitze Indian Tribe.

2. The child's primary placement with temporary guardianship is to be with his maternal grandparents, Mr. and Mrs. Dailey.

3. Protective measures are to be set in place to protect the child from harm.

4. Skylair is to continue with Mental Health Counseling at Nakenu Family Center and follow all recommendations made by the counselor.

5. Mr. and Mrs. Dailey are to attend parenting classes or some sort of support group for parenting teens.

6. Mr. and Mrs. Dailey are to fill out the CSSD paperwork in order to initiate a child support case.

7. Mr. Moreno is to sign releases of information in order to obtain and gather information regarding

any outstanding and or recent court actions and or criminal proceedings where he is a party.

8. No visits or phone visits are granted to Jorge Morena Jr. or Mathew Grant at this time pending psychological and physical evaluations.
9. Mathew Grant is to provide to the Courts the marriage certificate between Ms. Childress and him.
10. CASA Worker, Kym Miller is to check into respite care for Mr. and Mrs. Dailey.
11. Review hearing in October 2010.

Dated this 22nd day of July, 2010

s/ Rita Smagge
Rita Smagge, Chief Tribal Judge

s/ Mary Ann Mills
Mary Ann Mills, Tribal Judge

s/ Rusty Swann
Rusty Swan, Tribal Judge

Copies Distributed to:
Mr. and Mrs. Dailey via Mail
Jorge Morena Jr. via Mail
Mathew Grant via Mail
Nate Esteban – Tribal Court Liaison via Inter Office
Kym Miller – CASA via Inter Office

Supreme Court, U.S.
FILED
APR 7 - 2010
OFFICE OF THE CLERK

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(3)

No. 09-960

In the Supreme Court of the United States

WILLIAM H. HOGAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ALASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

KALTAG TRIBAL COUNCIL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Ninth Circuit held that the hundreds of Indian tribes in Alaska have the authority to initiate and adjudicate child custody proceedings involving nonmembers domiciled outside of Indian country and to compel the State to give full faith and credit to the decrees entered in such proceedings. Respondents firmly embrace that decision, and devote their efforts largely to arguing that it is "unremarkable." Opp.2. That contention cannot withstand scrutiny. Indeed, even respondents let slip that the basic question presented is "one of extraordinary importance to Alaska." Opp.9. And the far-reaching and real-world jurisdictional consequences of this case for the State of Alaska, its tribes, and, most importantly, the thousands of Alaskan children of mixed Alaska Native heritage (*see* Pet.10-15, 25-30) are undeniable—and thus go almost entirely unaddressed by respondents.

The significance of the Ninth Circuit decision is underscored by its departure from this Court's cases. This Court has repeatedly rejected efforts by Indian tribes "to regulate nonmembers, especially on non-Indian fee land." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2720 (2008); *see* Pet.16-20. Respondents suggest that these precedents do not apply to the child custody context. But the only instance in which the Court has recognized inherent tribal sovereignty over an adoption is "when *all* parties belonged to the Tribe and resided on its reservation." *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997) (emphasis added) (citing *Fisher v. District Court*, 424 U.S. 382, 386 (1976)). In stark contrast, the Ninth Circuit holds that tribes have

inherent authority over child custody proceedings involving *nonmembers outside Indian country*.

Respondents try to manufacture a "vehicle" (Opp.7) issue by arguing—for the first time in this case—that the nonmember father "consented" to the termination of his parental rights. Opp.4. But that issue is a red herring. This Court has previously held that parents may not consent to the subject-matter jurisdiction of an improper forum in the context of the adoption of an Indian child. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989). And, in any event, this case was decided on the premise that the custody proceeding at issue was neither "voluntary, nor among [tribal] members," Pet.App.16a, and respondents' position all along has been that the "voluntary" versus "involuntary" nature of a child custody proceeding "does not alter inherent tribal court jurisdiction" over such a proceeding. Appellees 9th Cir. Br.31. It is too late in the day for respondents to back track now.

In short, the question presented not only is undeniably important, it is squarely before the Court.

ARGUMENT

A. THE UNDENIABLE IMPORTANCE OF THIS CASE ALONE CALLS FOR REVIEW BY THIS COURT

When they are not attempting to avoid certiorari in this Court, respondents have recognized that this is a "very important" case. National Indian Law Library, Native American Rights Fund, *NARF Wins Case for Alaska's Tribal Children*, Mar. 26, 2008, *available at* http://narfnews.blogspot.com/2008/03/narf-wins-sse-for-alaskas-tribal.html. And it is easy to see why. The case concerns the authority of the State and the more

than 200 Indian tribes in Alaska over a matter that all agree is of fundamental importance—"[c]hild welfare" (Opp.28) and "parental rights" (Opp.5).

Moreover, because of Alaska's unique demographics and history, the decision below will have significant practical consequences for thousands of parent-child relationships in Alaska. Pet.11-15. If allowed to stand, over 200 tribes in Alaska will have geographically unbounded power to terminate the parental rights of nonmembers even when they and their children live outside Indian Country. Nonmember parents could be forced to defend their parental rights in far-away tribal forums where the Bill of Rights does not apply, and would be without any right to counsel or the benefit of other procedural protections mandated by the Indian Child Welfare Act (ICWA) or state law. Pet.26-29. And because substantial consequences turn on whether the tribe or parent establishes jurisdiction first, both tribes and parents will be incentivized to race to initiate child custody proceedings in their favored forum. Pet.25-26.

Alaska's children stand to lose the most under this jurisdictional regime. They will suffer when parents and tribes rush to litigation, and from the prolonged custody battles that will result when nonmember parents challenge the legitimacy of unfavorable tribal court rulings in state court. Pet.26, 29-30. Meanwhile, Alaska's courts will face the arduous task of sorting out whether or to what extent the custody orders of some 230 distinct legal regimes from tribes around the State are entitled to full faith and credit. Pet.29.

Respondents concede that such consequences are "untoward," but claim that they are merely "hypothetical." Opp.34. But the petition pointed to

numerous cases where the question presented has already arisen. And amici (at 2-6) point to still additional cases in which the question presented is recurring.[1] These cases underscore the real prospect of orders issued by far-away tribal courts purporting to terminate the custody of nonmember parents residing outside Indian country; little or no notice or procedural protections for nonmember parents in such proceedings; and prolonged disruption to the lives of the Alaskan children and families involved.[2]

These cases are far from outliers. As noted in the petition, Alaska's child protection service is currently overseeing *hundreds* of active cases involving children whose parents are members of different tribes. Pet.4. The question presented is therefore of immense practical importance to Alaska and its citizens.

B. THE NINTH CIRCUIT'S DECISION SHARPLY CONFLICTS WITH THIS COURT'S PRECEDENTS

Although respondents spare no effort in attempting to defend the decision below, they fail to account for the fact that the Ninth Circuit's conception of tribal authority is flatly at odds with this Court's precedents.

1. As respondents acknowledge (Opp.1-2), the decision below is grounded on the Ninth Circuit's

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[1] *Evansville Village v. Taylor*, No. 4FA-10-1226CI (Alaska Sup. Ct. filed Feb. 10, 2010); *Parks v. Simmonds*, 4FA-09-2508CI (Alaska Sup. Ct. filed Sept. 17, 2009).

[2] Respondents are correct that there is no reason for this Court to expand the question presented to address the additional issues discussed by amici. Pet.17 n.12. But that in no way diminishes the importance of the jurisdictional question that is presented.

decision in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) ("*Venetie I.R.A. Council*"). Respondents argue that the fact that *Venetie I.R.A. Council* was decided 20 years ago is a *virtue*. Opp.1-2. But that decision has only grown more anomalous with time. Indeed, since *Venetie I.R.A. Council* was decided, this Court has held that Alaskan tribes do *not* occupy Indian country, *see Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998), and has repeatedly rejected "the extension of tribal civil authority over nonmembers on non-Indian land," *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). The Ninth Circuit's rule that Alaskan tribes have authority to initiate and adjudicate child custody proceedings involving *nonmembers outside Indian country* is fundamentally out of step with those precedents.

Respondents attempt to defuse this clear conflict by pointing out that this Court has observed that tribes have authority to "'regulate domestic relations *among members*.'" Opp.28 (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)) (emphasis added). But far from empowering tribes to adjudicate the rights of *nonmembers* in such proceedings, this Court has specifically recognized that *Montana*'s "domestic relations *among members*" language means just that—explaining that the lone case that *Montana* cited for that proposition involved the authority of a "tribal court over an adoption proceeding when *all parties belonged to the Tribe and resided on its reservation*." *Strate*, 520 U.S. at 458 (emphasis added) (citing *Fisher*, 424 U.S. at 386); *see also Plains Commerce Bank*, 128 S. Ct. at 2718 (citing *Fisher* to support same language).

Throughout their opposition, respondents attempt to blur the critical distinction between the exercise of jurisdiction over *members* versus *nonmembers*. Thus, they rely on case law stating that Alaskan tribes may "'resolve domestic disputes between *their own members*.'" Opp.10 (quoting *John v. Baker*, 982 P.2d 738, 748-49 (Alaska 1999), *cert. denied*, 528 U.S. 1182 (2000)) (emphasis added). And they attempt to draw significance from the fact that Alaska has recognized tribal sovereignty over adoptions *among members*. *See* Opp.10-15 & App.1-4. But as this Court's precedents underscore, the jurisdictional equation is fundamentally different when, as here, a tribe is attempting to assert jurisdiction over *nonmembers*.

Respondents also suggest that the status of the child must control—and that the status of the parents is irrelevant, even when, as here, the proceeding involves the termination of parental rights. Opp.26. But of course, that argument is contradicted by the Court's recognition in *Strate* that "*all* parties belonged to the Tribe" in the one instance in which the Court has recognized tribal sovereignty over child custody proceedings. 520 U.S. at 458 (emphasis added). And it is further contradicted by this Court's precedents recognizing the common-sense principle that *parents* have independent—and constitutionally recognized—interests in such proceedings. *See* Pet.19. Respondents do not even attempt to address those cases.[3]

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[3] Respondents point to various lower court cases applying ICWA. *See* Opp.29-30 & n.6. But *none* of those cases suggest that tribes have inherent sovereign authority over nonmembers outside Indian country. And, as respondents conceded below, a

2. Respondents mischaracterize the way in which the Alaska courts have struggled with this issue. Opp.12-13. Far from the picture of "uniform[ity]" that respondents try to paint (Opp.13), the Alaska courts—like the Alaska Executive Branch, Pet.22 n.15—have flipped flopped on the issue. Indeed, the Alaska Supreme Court initially held that Alaskan tribes *lack* sovereignty over child custody disputes and explicitly rejected the Ninth Circuit's decision in *Venetie I.R.A. Council*. *See In re F.P.*, 843 P.2d 1214, 1216 (Alaska 1992). But the court later changed course and has since stated that Alaskan tribes have inherent power to adjudicate child custody disputes "between *tribal members*." *John*, 982 P.2d at 743 (emphasis added).

In any event, only this Court can address the Ninth Circuit's precedent. As long as this case and *Venetie I.R.A. Council* are the law of the Ninth Circuit, then—no matter what the Alaska courts say—tribes can always go to federal court and demand that decrees in proceedings involving nonmembers be given effect, as respondents did here. No "development" (Opp.32) of Alaska law can change that. And especially in light of the undeniable importance of the question presented and the fact that the Alaska courts have struggled with these issues for years, there is no reason to postpone this Court's review of the question presented.[4]

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tribe's statutory authority to receive a case transferred from state court pursuant to ICWA § 1911(b) does not address the scope of a tribe's inherent sovereign authority to initiate proceedings against nonmembers outside Indian country. Pet.25 n.16.

[4] Respondents claim (Opp.33) that this Court denied certiorari "to review the same issue" in *John v. Baker*. Not so. The petition in *John* challenged whether Alaskan tribes were properly

3. Respondents also fail to account for the conflict between the decision below and ICWA. Pet.22-25. Indeed, the Ninth Circuit's decision dismantles the scheme carefully crafted by Congress in ICWA—with the interests not only of tribes, but of parents and children and States in mind. The decision authorizes a tribe that lacks the land base necessary to invoke the "exclusive jurisdiction" provision in § 1911(a) to *bypass* the "transfer" provision in § 1911(b) and initiate a child custody proceeding directly in tribal court. And as a result, the Ninth Circuit's decision deprives parents, including nonmembers parents, of the veto right that Congress gave them over tribal court involvement, not to mention numerous other protections. Pet.23-24.

More fundamentally, respondents fail to account for the fact that it was *not* Congress' intent "to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits." H.R. Rep. No. 95-1386, at 19 (1978); *see also In re Greybull*, 543 P.2d 1079, 1080 (Or. 1975) (cited approvingly in H.R. Rep. No. 95-1386, at 21) ("The general rule is that Indians domiciled off their reservation are subject to state laws."). Yet the Ninth Circuit's rule does precisely that—permitting the 200-plus Alaskan tribes to oust the State of its jurisdiction over thousands of nonmember parents outside Indian country.

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recognized by the federal government at all. *John* Pet.i (No. 99-973). This case concerns the authority of Alaskan tribes over nonmembers residing off-reservation in child custody proceedings—a quite different matter. Pet.17 n.12.

C. THIS CASE PRESENTS A TIMELY VEHICLE TO DECIDE THE IMPORTANT QUESTION PRESENTED

1. Respondents' effort to avoid certiorari by attempting to manufacture a "vehicle" (Opp.7) issue also fails. Respondents' principal ploy is to argue—for the first time in this case—that the nonmember father and nonmember adoptive parents "consented" to the tribe's jurisdiction and that such consent eliminates any objection to the tribe's subject-matter jurisdiction over the adoption proceedings. Opp.4. That argument not only has been waived because it was not raised below, but it is fundamentally flawed on several levels.

This Court has already rejected the proposition that parents may "voluntarily surrender" to the subject-matter jurisdiction of an improper forum in an Indian child custody proceeding. *Holyfield*, 490 U.S. at 49. In *Holyfield*, Indian parents sought to consent to a state court adoption proceeding; the rule is no different when parents (allegedly) seek to consent to a tribal court adoption proceeding. And that rule squares with the hornbook rule that consent or waiver is *never* sufficient to confer subject-matter jurisdiction. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); 2 James Wm. Moore, *Moore's Federal Practice* § 12.30[1] (3d ed. 2009) ("Lack of subject matter jurisdiction ... may not be waived.").

That settled rule is a complete answer to respondents' argument. But in any event, this case was decided by the courts below on the premise that the adoption proceeding was *not* "voluntary." Pet.App.16a. Respondents never disputed that the proceeding at issue was involuntary before the Ninth Circuit or once argued that the nonmember parents

consented to the adoption. To the contrary, respondents argued that the voluntary versus involuntary nature of a case has no bearing on a tribe's subject-matter jurisdiction. Appellees 9th Cir. Br.31 ("The Commissioner's 'voluntary vs. involuntary' distinction makes no sense ... and finds no support in federal Indian law.").

And if consent were ever a relevant consideration, the requisite consent is plainly lacking here. The record indicates that the nonmember father (who was not represented by counsel) was unable to attend the proceedings. Opp.App.12 (¶7). But the momentous decision to relinquish one's parental rights cannot be effected by an unrepresented Indian parent's mere failure to attend to a hearing, or to object to such a proceeding. One of the chief concerns that Congress sought to address in ICWA was the absence of adequate consent—and the uninformed waiver of parental rights. *See* H.R. Rep. No. 95-1386, at 11 ("[T]he voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children."); *id.* at 31 ("Testimony on the problems with present Indian child placement proceedings repeatedly pointed out the lack of informed consent on the part of many Indian parents who have lost their children.").

Congress addressed this concern by mandating that indigent Indian parents were entitled to counsel, 25 U.S.C. § 1912(b), and that no case could be transferred to tribal court without a stringent judicial inquiry into consent, *id.* § 1913(a). Those requirements applied even where it was clear that the tribal court would have subject-matter jurisdiction over the proceeding. Even if a nonmember parent could consent to a tribe's subject-matter jurisdiction over the termination of his

parental rights, no less demanding standard would be warranted. And section 1913(a)'s requirements were indisputably not satisfied as to the nonmember parent.

2. Respondents say that "the State ... never raised" the issue of "involuntary tribal jurisdiction over non-member Indians" below. Opp.8. That is incorrect. In the district court, the State clearly argued that "[Alaskan] tribes have no inherent authority to *initiate* child protection proceedings affecting the rights of non-members domiciled off-reservation." Alaska Mot. Summ. J.26; *see* Pet.App.16a. Likewise, in the Ninth Circuit, the State argued that the tribe lacks jurisdiction over "involuntary child protection matters involving nonmember parents." Appellants 9th Cir. Br.48 (heading); *see also* Appellants 9th Cir. Reply Br.17 ("[T]he nonmember father was involuntarily involved as a defendant ...."); *accord id.* at 6-7, 25-26. The courts below rejected that argument. The district court held that the "voluntary versus involuntary" nature of an adoption proceeding is irrelevant, Pet.App.16a, and the Ninth Circuit affirmed without correcting that erroneous legal holding.

Respondents' suggestion (Opp.23) that the State somehow "chose to defer to the Kaltag Tribal Court" is likewise unfounded. The tribe gave the State no notice before initiating this case in tribal court, and the State was not informed of the tribal court's decree in this case until respondents demanded that the State recognize that decree. Since then, the State has consistently—and vigorously—challenged the tribe's

jurisdiction to enter that decree involving nonmember parents outside Indian country.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[5] Respondents also suggest that certiorari is not warranted because the underlying adoption occurred several years ago. Opp.4. But child custody cases typically take several years to reach this Court. *See, e.g.*, *Holyfield*, 490 U.S. at 53 (three years); *Abbott v. Abbott*, 542 F.3d 1081, 1082 (5th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (June 29, 2009) (No. 08-645) (pending) (five years). The ongoing placement may be considered on remand, *Holyfield*, 490 U.S. at 53-54, but provides no basis to deny review of the important question presented. And because the question presented affects potentially thousands of Alaskan children and families, this Court's review is urgently needed.

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No. 09-960

In the Supreme Court of the United States

WILLIAM H. HOGAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ALASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

KALTAG TRIBAL COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, for purposes of the Indian Child Welfare Act of 1978, 25 U.S.C. 1901 *et seq.*, a tribal court has concurrent jurisdiction with state courts to initiate and adjudicate a child-custody proceeding about an Indian child, when the child and her biological mother are tribal members and the nonmember biological father does not object to tribal-court jurisdiction, and when the child is not domiciled or residing within a reservation.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. The United States is committed to principles of self-determination and self-government of Indian tribes, including through the development of tribal courts and support for child-welfare systems. See, *e.g.*, 25 U.S.C. 3601 (affirming federal policy of supporting tribal justice systems); 25 U.S.C. 1931-1934 (authorizing grant program for Indian child services); *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14-15 (1987). In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. In 1978, Congress determined that federal action was necessary to protect tribal jurisdiction over child-custody proceedings involving Indian children because "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. 1901(3). Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. 1901(4). Congress also found "that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5).

Responding to those concerns, Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.* ICWA expresses a preference for tribal jurisdiction over custody proceedings about Indian children, but it also provides procedural and substantive standards to be followed in state-administered proceedings, in order to "protect the best interests of Indian children" and to "promote the stability and security of Indian tribes and families." 25 U.S.C. 1902; see, *e.g.*, 25 U.S.C. 1912-1913 (procedural standards); 25 U.S.C. 1915(a)-(b) (substantive "preference" for placing Indian children with Indian families).

ICWA's applicability turns principally on whether a child-custody proceeding involves an "Indian child," defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the

biological child of a member of an Indian tribe." 25 U.S.C. 1903(4). A "child custody proceeding" is, in turn, defined as including any action for "foster care placement," "termination of parental rights," "preadoptive placement," or "adoptive placement." 25 U.S.C. 1903(1)(i)-(iv). It does not include a custody decision made in a divorce proceeding. 25 U.S.C. 1903(1).

As this Court has explained: "At the heart of * * * ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 36 (1989). Under Section 1911(a), a tribe generally has "exclusive" jurisdiction over proceedings involving an Indian child "who resides or is domiciled within the reservation of such tribe." 25 U.S.C. 1911(a). Under Section 1911(b), there is "concurrent but presumptively tribal jurisdiction in the case of [Indian] children not domiciled on the reservation." *Holyfield*, 490 U.S. at 36. Thus, ICWA requires that, "[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation," the state court must—upon the petition of the child's parent, tribe, or Indian custodian—"transfer such proceeding to the jurisdiction of the tribe," unless there is "good cause to the contrary" or an "objection by either parent." 25 U.S.C. 1911(b). The tribe may decline to exercise its jurisdiction over a proceeding transferred from state court, *ibid.*; and the tribe may exercise "a right to intervene at any point" in a state-court proceeding. 25 U.S.C. 1911(c).

In addition to ensuring tribes' ability to exercise jurisdiction over child-custody proceedings, ICWA protects the results of those proceedings by requiring the

United States, States, territories, and other Indian tribes to "give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent" that they do for "the public acts, records, and judicial proceedings of any other entity." 25 U.S.C. 1911(d).

b. There are 229 federally recognized Indian tribes in Alaska, including, as relevant here, the Village of Kaltag. See 25 U.S.C. 479a, 479a–1 (authorizing the Secretary of the Interior to publish a list of recognized tribes, including "Alaska Native tribe[s]"); 74 Fed. Reg. 40,218, 40,219, 40,222 (2009) (listing the Village of Kaltag as a federally recognized tribe that has "the immunities and privileges available to other federally acknowledged Indian tribes * * * as well as the responsibilities, powers, limitations and obligations of such tribes"); 58 Fed. Reg. 54,366 (1993) (noting that Alaskan Native tribes have the "right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes").

This Court has held that lands conveyed by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, do not constitute "Indian country" within the meaning of 18 U.S.C. 1151. *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 532-534 (1998). As a result, most of the land held by Alaska Native tribes is not within a "reservation," as that term is defined in ICWA. 25 U.S.C. 1903(10). Such tribes are, however, expressly included in ICWA's definition of an "Indian tribe." 25 U.S.C. 1903(8).[1]

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[1] The United States agrees with the parties (Reply Br. 4 n.2; Br. in Opp. 2 n.1) that this Court should not expand the question presented (as

2. This case involves a child, N.S., who was born in October 1999. Pet. App. 4a. Her biological mother is a Kaltag tribal member, and her biological father is either a member of, or eligible for membership in, the Koyukuk tribe. *Id.* at 4a, 23a. N.S. is thus an "Indian child" under ICWA, though she has not resided or been domiciled within a reservation. *Id.* at 4a; 25 U.S.C. 1903(4).

During home visits in June and September 2000, a Kaltag tribal social worker found N.S.'s mother passed out or intoxicated and unable to care for N.S. Br. in Opp. App. 6-7. N.S. was placed in temporary custody by the Kaltag Tribal Court for two weeks in June and then taken into emergency custody in September. *Ibid.*

On September 27, 2000, after a hearing, the Kaltag Tribal Court concluded that N.S. was a child in need of aid, declared her a ward of the court, and ordered that she be placed in the temporary custody of her maternal uncle and his wife for 60 days. Br. in Opp. App. 7-8. At the time, the identity of N.S.'s father was unknown. *Id.* at 7. The tribal court instructed the tribal social worker to monitor N.S.'s well being, and requested that her mother become and remain sober for the safety and well being of N.S. *Id.* at 8-9. Between December 2000 and March 2003, the court held several additional hearings and retained temporary legal custody of N.S., because her mother continued to be unable to care for N.S., either because of her continued use of alcohol or her incarceration for a parole violation. *Id.* at 11-12; Br. in Opp. 17.

N.S.'s putative father (from the Koyukuk Native Village) was identified before a March 2003 hearing, of

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amici propose) to address an issue never contested in the courts below: whether the Village of Kaltag is a tribe.

which he received advance written notice. Br. in Opp. App. 12. He did not appear for that or subsequent hearings, and told a tribal social worker that "he did not want his family involved" with N.S. Pet. App. 25a.

On April 22, 2004, the Kaltag Tribal Court granted temporary physical custody of N.S. to Hudson and Selina Sam, residents of Huslia, Alaska. Pet. App. 28a. On July 29, 2004, after another hearing (of which N.S.'s father received written and verbal notice, and at which N.S.'s mother was present), the tribal court terminated the parental rights of N.S.'s birth parents and granted permanent guardianship to the Sams. *Id.* at 24a, 26a. In August 2005, the Sams petitioned their own tribal court to adopt N.S. That court forwarded the petition to the Kaltag Tribal Court, because N.S. was a Kaltag tribal member and that court had already exercised jurisdiction over her. *Id.* at 5a.

On October 14, 2005, the Kaltag Tribal Court held a hearing and issued an order of adoption declaring the Sams to be N.S.'s parents. Pet. App. 21a-22a. The tribal court clerk submitted a Report of Adoption to the Alaska Bureau of Vital Statistics and requested a new birth certificate for N.S. *Id.* at 5a. On January 26, 2006, nearly six years after the Kaltag Tribal Court had first assumed jurisdiction, the Bureau rejected the request because—in a departure from the practice it had followed between 2000 and September 30, 2004—it would not recognize the validity of the adoption order from the Kaltag Tribal Court. *Id.* at 5a-6a; Br. in Opp. App. 2.

3. On September 8, 2006, respondents (the Kaltag Tribal Council and N.S.'s adoptive parents) filed this suit in the United States District Court for the District of Alaska. Pet. App. 6a. The defendants in the district court (petitioners here) are three state officials respon-

sible for issuing new birth certificates recognizing adoptions. Pet. ii. Respondents sought a declaration that the Kaltag Tribal Court's adoption order is entitled to full faith and credit under 25 U.S.C. 1911(d) and an injunction requiring the state officials to issue a substitute birth certificate for N.S. Pet. App. 6a. Both sides sought summary judgment.

The district court rejected petitioners' argument that Section 1911(b) permits only a state court to initiate child protection proceedings for Indian children not domiciled on a reservation. Pet. App. 4a-20a. Relying on this Court's statement in *Holyfield* that Section 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation," 490 U.S. at 36, the court held that it "would be incongruent * * * to find that 'presumptively tribal jurisdiction' requires the [t]ribe to first defer jurisdiction to the state court, and then wait for the state court to transfer the matter to tribal court." Pet. App. 14a-15a. The court further determined that a tribe's jurisdiction over a child-custody proceeding is controlled by "the membership of the child * * *, not the membership of the individual parents." *Id.* at 17a. Finally, the court rejected petitioners' argument that concurrent tribal jurisdiction is precluded by either ICWA or Public Law 280.[2] *Id.* at 18a-19a.

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[2] Public Law 280 (*i.e.*, Pub. L. No. 83-280, 67 Stat. 588 (1953)) "allows [certain] States under certain conditions to assume civil and criminal jurisdiction on [Indian] reservations." *Holyfield*, 490 U.S. at 43 n.16. It does not, however, terminate tribal powers. See, *e.g.*, *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 489 n.32 (1979). In any event, Public Law 280 applies exclusively in Indian country, see 28 U.S.C. 1360(a), making it largely inapplicable in Alaska, see *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 532-534.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-3a. It held that "[t]he district court's decision that full faith and credit be given to the Kaltag court's adoption judgment is compelled by this circuit's binding precedent." *Id.* at 2a (citing *Native Village of Venetie I.R.A. Council* v. *Alaska*, 944 F.2d 548, 562 (9th Cir. 1991)). The court of appeals explained that, for purposes of a child-custody proceeding, "[r]eservation status is not a requirement of jurisdiction because '[a] [t]ribe's authority over its reservation or Indian country is incidental to its authority over its members.'" *Id.* at 2a-3a (quoting *Native Village of Venetie I.R.A. Council*, 944 F.2d at 559).

DISCUSSION

The court of appeals correctly determined that the tribal court had concurrent jurisdiction to initiate and adjudicate proceedings concerning custody over a child member of the tribe, despite the subsequent discovery that the child's biological father was not a member of the tribe. This case presents no reason to reconsider the longstanding rule providing for concurrent tribal-court and state-court jurisdiction over child-custody proceedings involving Indian children who are not domiciled or residing on a reservation. Moreover, the court of appeals' decision does not conflict with a decision of any federal court of appeals or state court of last resort, and the Alaska Supreme Court is currently considering the issue in this case. Further review by this Court is not warranted.

A. The Court Of Appeals Correctly Held That The Tribal Court Had Concurrent Jurisdiction In A Proceeding About Custody Over A Child Member Of The Tribe

1. The court of appeals' conclusion that the tribal court had concurrent jurisdiction in a proceeding concerning custody of a child who is a member of the tribe is firmly rooted in fundamental principles of Indian law.

This Court has recognized that Indian tribes have "inherent powers of a limited sovereignty which has never been extinguished." *United States* v. *Wheeler*, 435 U.S. 313, 322 (1978) (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1945)) (emphasis omitted). Tribes continue to "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.* at 323 (citing *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

Tribal jurisdiction over domestic relations, including the welfare of child members of the tribe, lies at the core of that retained sovereignty. See, *e.g.*, *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 42 (1989) ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA."); *Fisher* v. *District Court*, 424 U.S. 382, 389 (1976) (pre-ICWA case recognizing that a tribal court had exclusive jurisdiction over an adoption proceeding involving tribal members residing on the reservation); *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886) (tribes are "a separate people" possessing "the power of regulating their internal and social relations").

Indian tribes' retained authority over child-welfare matters is confirmed by ICWA. Section 1911(b)'s scheme of "concurrent but presumptively tribal jurisdiction" (*Holyfield*, 490 U.S. at 36) recognizes inherent

tribal authority over the welfare of tribal children—even when they reside outside of a reservation. By its terms, Section 1911(b) does not constitute a grant of jurisdiction to a tribe over matters involving off-reservation member children; instead, it assumes that tribal-court jurisdiction already exists, and requires that a state court—upon the request of a parent, tribe, or Indian custodian, and absent any objection by a parent or good cause to the contrary—"transfer such proceeding to the jurisdiction of the tribe." 25 U.S.C. 1911(b).

That understanding of Section 1911(b) is borne out by its legislative history, which describes Section 1911(b) as being "intended to permit a State court to apply a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." H.R. Rep. No. 1386, 95th Cong., 2d Sess. 21 (1978) (*1978 House Report*). Although *forum non conveniens* is a mechanism for transferring venue, it does not create subject-matter jurisdiction in the receiving court. See, *e.g.*, *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994) (noting the doctrine applies "when an alternative forum has jurisdiction to hear [a] case"). That reliance on *forum non conveniens* principles thus confirms that Section 1911(b) was intended as a means to transfer a pending case from a state court to a tribal court that, independent of ICWA, already possesses jurisdiction over such matters.

2. Petitioners do not contend that any statute has divested Alaska Native tribes of their inherent sovereignty. See Pet. 17 n.12. Instead, petitioners argue that the scope of the inherent powers recognized by the court below "exceeds that recognized by any of this Court's precedents." Pet. 18. In making that argument, peti-

tioners focus (Pet. 17; Reply Br. 5-6) on decisions of this Court observing that, as a "general proposition," the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2720 (2008) (citations omitted). None of those cases, however, implicated the kind of tribal authority that is relevant here.

In *Montana* v. *United States*, 450 U.S. 544 (1981), the Court recognized that, even "without express congressional delegation," tribes retain the power to do "what is necessary to protect tribal self-government or to control internal relations." *Id.* at 564. That power includes authority over the conduct of nonmembers "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. In the cases petitioners invoke (Pet. 17), the Court found that certain forms of tribal regulation did not sufficiently implicate a tribe's political integrity, health, or welfare. In *Plains Commerce Bank*, the Court held that a tribe's inability to regulate the terms under which a non-Indian could sell non-Indian fee land to a non-Indian did not "'imperil the subsistence' of the tribal community." 128 S. Ct. at 2726 (quoting *Montana*, 450 U.S. at 566). Similarly, in *Nevada* v. *Hicks*, 533 U.S. 353 (2001), the Court held that state law-enforcement officers who enter a reservation to execute process related to an off-reservation violation of state law do not "threaten[] or ha[ve] some direct effect" on the tribe's political integrity, health, or welfare. *Id.* at 371 (quoting *Montana*, 450 U.S. at 566).

Here, by contrast, the close relationship between Indian child-custody proceedings and a tribe's political integrity, health, and welfare is undeniable. Indeed,

Congress expressly found in ICWA that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. 1901(3); see also 25 U.S.C. 1902 (ICWA serves "the policy of this Nation to * * * promote the stability and security of Indian tribes"). And the accompanying House Report explained that "there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the * * * tribe to govern themselves than to interfere with tribal control over the custody of their children." *1978 House Report* 15 (quoting *Wakefield* v. *Little Light*, 347 A.2d 228, 237-238 (Md. 1975)) (ellipsis in House Report).

3. In an attempt to portray child-welfare proceedings as being about something other than a tribe's "internal relations," petitioners focus (Pet. 18) on the "nonmembers" of the Kaltag tribe who were eventually involved in this case: N.S.'s father and her adoptive parents. But ICWA's jurisdictional scheme appropriately focuses on the status of the child at the heart of the custody proceeding, not the identities of other parties (or potential parties). And of course when a child is a tribal member, the child will almost invariably have a parent who is also a member. Neither tribal jurisdiction under Section 1911(a) and (b), nor Section 1911(d)'s requirement to extend full faith and credit to tribal proceedings is subject to an exception based on the membership status of some other party.

Moreover, allowing a tribe's jurisdiction to be ousted by such considerations would be inconsistent with well-established practice outside the Indian context. Under uniform acts governing child-custody proceedings in all 50 States, the principal locus of "jurisdiction to make an initial child-custody determination" is the child's "home

State," and the child's "[p]hysical presence" is "not necessary or sufficient" to make a determination.[3] In this case, by virtue of N.S.'s tribal membership (and residence in the Village of Kaltag), the Village was the equivalent of N.S.'s "home State." The fact that her father turned out to be from somewhere else (*i.e.*, the equivalent of a proceeding with one out-of-state parent) would not have been enough under those rules to preclude jurisdiction in the Kaltag Tribal Court.[4] Similar jurisdictional predicates apply under the Parental Kidnapping Prevention Act of 1980, which generally provides for full faith and credit to be given to state courts' child-custody determinations. 28 U.S.C. 1738A(a) and (c).

4. Finally, petitioners suggest that tribal jurisdiction in a child-custody proceeding involving a nonmember would somehow be inappropriate because parents have due process rights "in the care, custody, and con-

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[3] Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) § 201(a)(1) and (c) (1997), 9(1A) U.L.A. 671 (1999) (followed in 48 States); Uniform Child Custody Jurisdiction Act (UCCJA) § 3(a)(1) and (c) (1968), 9(1A) U.L.A. 307 308 (1999) (followed in Massachusetts and Vermont).

[4] Under the UCCJEA, if there is no "home State" when the proceeding commences, the next basis for jurisdiction arises in a State where "the child and the child's parents, or the child and at least one parent * * *, have a significant connection * * * other than mere physical presence," and "substantial evidence is available * * * concerning the child's care, protection, training, and personal relationships." UCCJEA § 201(a)(2)(A) and (B); UCCJA § 3(a)(2). If the Village of Kaltag were not appropriately analogized to N.S.'s "home State," it would satisfy those additional criteria, because N.S. and her mother each had a "significant connection" other than mere physical presence with the Village of Kaltag (*i.e.*, tribal membership and residence), and there was significant evidence there about N.S.'s care, protection, and relationships.

trol of their children." Pet. 19 (citing *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000); *Parham* v. *J.R.*, 442 U.S. 584, 601-602 (1979)). But the possibility of a due process violation does not go to jurisdiction. Tribal courts are prohibited from denying persons due process. 25 U.S.C. 1302(8). And, to the extent that a particular tribal-court proceeding fails to satisfy due process, that could be a reason to deny full faith and credit to an order that results from the proceeding—but not to contend that the tribal court lacked jurisdiction *ab initio*. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291 (1980); see also *Jurisdiction of State and Tribal Courts in Child Protection Matters*, 2004 Op. Alaska Att'y Gen. No. 1, at 27 (Oct. 1), http://www.law.state.ak.us/pdf/opinions/opinions_2004/04-019_661040467.pdf (*2004 State A.G. Op.*) ("[F]ull faith and credit requires that the issuing court afford the parties due process[.]").[5]

B. There Is No Conflict With Other Federal Courts Of Appeals Or State Courts Of Last Resort

1. Petitioners contend (Pet. 20) that the decision below conflicts with those of other circuits. But none of the federal cases they cite has anything to do with child-custody proceedings, much less ones that fall within ICWA. In *Nord* v. *Kelly*, 520 F.3d 848 (8th Cir. 2008), for example, the court held that a tribe lacked jurisdiction over a claim against a non-Indian arising from a "commonplace automobile accident" between strangers that occurred on a state highway that was open to the

[5] In this case, there are no allegations that a parent was deprived of due process. In fact, neither the biological nor the adoptive parents have raised any objections to the jurisdiction or proceedings of the tribal court; and the adoptive parents actively seek recognition of that court's adoption order.

public. *Id.* at 854-857. Such a tort suit simply does not bear the same close relationship to "the continued existence and integrity of Indian tribes" that Congress has recognized is necessarily present in custody proceedings concerning a child who is a member of the tribe. 25 U.S.C. 1901(3). The same is true with respect to the off-reservation manufacture, sale, distribution, and advertising of malt liquor that was held to be beyond tribal jurisdiction in *Hornell Brewing Co.* v. *Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093 (8th Cir. 1998), and the employment-related activities of a nonmember on non-Indian land that were held to be beyond tribal jurisdiction in *MacArthur* v. *San Juan County*, 497 F.3d 1057, 1070-1071 (10th Cir. 2007), cert. denied, 552 U.S. 1181 (2008).

2. Petitioners also assert (Pet. 21) that the decision below conflicts with decisions of the North and South Dakota Supreme Courts. But, again, there is no conflict. In *Roe* v. *Doe*, 649 N.W.2d 566 (N.D. 2002), the court considered a paternity determination, which was beyond ICWA's scope (25 U.S.C. 1903(1)), and it expressly declined to decide whether the tribal court had *concurrent* jurisdiction. 649 N.W.2d at 576. The court held only that a tribal court did not have *exclusive* jurisdiction when there was no evidence that the child was a tribal member or even eligible for tribal membership. *Id.* at 576, 580. Here, by contrast, petitioners do not dispute the tribal court's conclusion that "[u]nder the tribal constitution of Kaltag, [N.S.] is a Kaltag tribal member." Pet. App. 23a; Br. in Opp. App. 10.

The South Dakota Supreme Court's decision in *In re Defender*, 435 N.W.2d 717 (1989), is also inapposite, because it held that, "absent the applicability of the ICWA," tribal courts did not have "exclusive authority

to adjudicate disputes" involving Indian children who did not reside on a reservation. 435 N.W.2d at 722. That decision did not address whether there is concurrent tribal jurisdiction over proceedings—like those here—that are governed by ICWA.[6]

3. Finally, petitioners assert (Pet. 21-22) that review by this Court would alleviate confusion within the Alaska state courts about the scope of tribal jurisdiction under ICWA. In fact, there appears to be little confusion in the Alaska courts. In recent years, the Alaska Supreme Court has twice confirmed the legitimacy of tribal jurisdiction in Indian child-welfare matters. In 1999, in a non-ICWA case between parents who were members of different Alaska Native tribes, that court recognized that, even though those tribes are not located in Indian country, a custody dispute about a child tribal member "lies at the core of sovereignty." *John* v. *Baker*, 982 P.2d 738, 758, cert. denied, 528 U.S. 1182 (2000) (emphasis added). And in 2001, the Alaska Supreme Court further held that Alaska Native tribes are able to accept jurisdiction over cases transferred from state courts under Section 1911(b) without first petitioning the Secretary of the Interior for "reassumption" of jurisdiction under 25 U.S.C. 1918. *See In re C.R.H.*, 29 P.3d 849, 852 (overruling *Native Vill. of Nenana* v. *State*, 722 P.2d 219 (Alaska 1986)).

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[6] Although petitioners identify no case rejecting a tribal court's concurrent jurisdiction in a child-custody proceeding involving a child tribal member, the Montana Supreme Court has upheld concurrent jurisdiction in such circumstances, even when ICWA does not apply. *See In re Marriage of Skillen*, 956 P.2d 1, 18 (1998) ("we hold that when an Indian child resides off the reservation, the state court and tribal court share concurrent jurisdiction" over child-custody dispute).

In fact, any uncertainty about tribal jurisdiction over Indian child-custody proceedings in Alaska appears to stem not from state-court decisions but from a 2004 opinion of the State Attorney General, which reversed a 2002 memorandum recognizing concurrent tribal- and state-court jurisdiction and concluded that "Alaska state courts have exclusive jurisdiction over child custody proceedings involving Alaska Native children" except when "(1) the child's tribe has successfully petitioned the Department of [the] Interior to reassume exclusive or concurrent jurisdiction under * * * 25 U.S.C. § 1918 or (2) a state superior court has transferred jurisdiction * * * in accordance with 25 U.S.C. § 1911(b)." *2004 State A.G. Op.* 2 n.3, 3.

In any event, the Alaska Supreme Court is currently considering whether the 2004 State Attorney General opinion is correct.[7] The pendency of that case would make this an especially odd time for this Court to grant certiorari for the purpose of providing "guidance" to Alaska's own courts (Pet. 22). If the Alaska Supreme Court, consistent with its own precedents in *John* v. *Baker* and *In re C.R.H.*, agrees with the longstanding position of the Ninth Circuit that was reaffirmed in the decision below, any confusion in the state courts will be eliminated. Such a decision would obviate petitioners' fear that tribes might need to "go to federal court and demand that decrees in proceedings involving nonmembers be given effect." Reply Br. 7. It would also confirm

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[7] As petitioners acknowledge (Pet. 22 n.15), in *State* v. *Native Village of Tanana*, No. S-13332 (Alaska S. Ct.), the State of Alaska is challenging an Alaska Superior Court decision finding that tribes retain concurrent jurisdiction to initiate and adjudicate child-custody cases under ICWA. The Alaska Supreme Court heard oral argument in *Tanana* on December 10, 2009.

that this Court's intervention is not needed to eliminate any disagreement between different court systems. Cf. *Johnson* v. *California*, 545 U.S. 162, 164 (2005) (certiorari granted because the Ninth Circuit and the California Supreme Court disagreed on a question affecting the validity of California criminal convictions); *DeCoteau* v. *District County Court*, 420 U.S. 425, 430-431 (1975) (certiorari granted to resolve a conflict between the Eighth Circuit and the South Dakota Supreme Court about South Dakota's jurisdiction over certain lands).

C. Other Considerations Advanced By Petitioners Do Not Warrant This Court's Review

1. Petitioners contend that certiorari should be granted because the court of appeals' decision will have "enormous practical implications." Pet. 25. That assertion, however, rings hollow because the court of appeals' unpublished decision added nothing to "binding" circuit precedent that has already been on the books for almost 20 years. Pet. App. 2a; see also 9th Cir. R. 36-3(a) (unpublished Ninth Circuit dispositions are generally "not precedent").

In any event, petitioners' position is the one that would have adverse practical effects, as this case well illustrates. Petitioners' argument would bar tribal-court jurisdiction over "child custody proceedings involving a nonmember." Pet. i. But there was no "nonmember" involved in the proceeding about N.S. when the Kaltag court took temporary custody in September 2000. Pet. App. 5a. At that point, the parties were N.S. and her biological mother, both of whom were tribal members. *Id.* at 23a. The father's identity was "unknown," Br. in Opp. App. 7, and it remained unknown until March 2003, *id.* at 10—long after N.S. had already been made a ward

of the tribal court. Petitioners' inflexible rule would oust the tribal court of jurisdiction upon the discovery that a nonmember was "involved." It would require a new proceeding to be "initiated" in state court, at which point Section 1911(b) would create a presumption that the proceeding would be transferred back to tribal court, barring an objection from a parent or "good cause." As the district court concluded, that would be an "incongru[ous]" way to implement a presumption in favor of tribal jurisdiction. Pet. App. 14a. Nor would it appear to be calculated to "protect the best interests of Indian children." 25 U.S.C. 1902.

2. Petitioners also express concern that the court of appeals' decision creates incentives for a "race to the courthouse" by Indian tribes, and may impose "[g]eographic burdens" on nonmembers. Pet. 25-26, 28-29. But again, petitioners point to no untoward consequences in the almost 20 years since the Ninth Circuit issued the decision that was followed here. To the contrary, tribes generally seek to work cooperatively with States —and with other tribes, as was the case here—to ensure the best outcomes for Indian children, including, where appropriate, by deferring to state agencies or tribunals. One study found that tribes are selective in their requests to transfer jurisdiction from state courts under Section 1911(b), precisely because States may be able to offer more services under certain circumstances, and because tribes are often able to work cooperatively with States with respect to children in state custody. U.S. Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States* 31-32 (Apr. 2005) (*GAO Study*); see also B.J. Jones et al., *Indian Child Welfare Act: A Pilot*

Study of Compliance in North Dakota 23-24, 43-44 (Dec. 2000), http://www.nicwa.org/research/04.ICWA.pdf (finding North Dakota tribes rarely request transfer of proceedings to tribal jurisdiction because of disruption for the child, the State's greater resources, and the limitations of tribal-court systems). As petitioners recognize, Alaska Native tribes do not always seek jurisdiction over cases involving tribal children, but instead often choose to defer to or intervene in state court proceedings. See Pet. 4, 12 (the State "is currently overseeing *hundreds* of active cases in which a child has parents who are members of two different tribes"); *2004 State A.G. Op.* 10 (noting that "intervention in state court proceedings is the most common form of involvement in ICWA proceedings for Alaska tribes").

The potential for some "[g]eographic burdens" (Pet. 28) is inherent in *any* child custody proceeding (tribal or not) when two parents live far apart. But that is no reason to systematically prefer state courts over tribal ones. Indeed, in many cases in rural Alaska, as may well have been the case here, the tribal court will be the most (or only) convenient forum for all parties involved. See Alaska Judicial Council, *A Directory of Dispute Resolution in Alaska Outside Federal and State Courts* 19 (Mar. 1999), http://www.ajc.state.ak.us/reports/rjdir99.pdf ("It has been difficult for the State of Alaska to provide its remote areas with law enforcement, child protection, criminal prosecution and defense, court services, and corrections. In many rural communities, tribes have taken on some of the dispute resolution functions that are performed by the state in urban areas."); *id.* at 20 ("[State] justice services and facilities are unequally distributed across the state, causing many problems to go unaddressed."); see also *GAO Study* 32 (noting tribes

are often reluctant to obtain jurisdiction when "the parent lives far from the reservation because the tribe will not be able to provide services or monitor the family").

3. Ultimately, petitioners provide no reason to believe that the established system of concurrent jurisdiction failed to work effectively here. Kaltag tribal social workers identified N.S. as a child in need of aid and took prompt action to ensure her safety. The Kaltag Tribal Court then oversaw N.S.'s welfare, ensured that she was placed with appropriate guardians, provided both biological parents with notice of all proceedings, gave opportunities for both parents to seek custody of the child, and eventually approved a suitable adoptive family. Neither parent objected to the tribal court's jurisdiction, to the venue, or to the conduct of the proceedings.[8] Although a state social worker was aware that N.S.'s mother was unable to care for her, the State did not initiate a child-in-need-of-aid case, or otherwise take action on N.S.'s behalf. Pet. App. 15a & n.21; Br. in Opp. App. 6.

As this case illustrates, a regime of concurrent tribal-court and state-court jurisdiction over child-custody

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[8] Non-tribal-member parents or other interested parties who object to tribal-court jurisdiction, venue, or procedures are not without recourse. Parties, of course, may object in tribal court and request that the case be heard in a different tribal court or a state court. A parent could also initiate his or her own action in state court, or ask the State to do so. Any overlap between state and tribal jurisdiction may be worked out between those courts in individual proceedings. Alternatively, ICWA contemplates that States and tribes may agree upon formal mechanisms for the "orderly transfer of jurisdiction on a case-by-case basis." 25 U.S.C. 1919. In addition, subject to tribal court exhaustion requirements, an interested party could challenge tribal court jurisdiction in federal court. See *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-853 (1985).

matters involving tribal children is not only correct, but also serves Congress's purposes in enacting ICWA: to "protect the best interests of Indian children" and "promote the stability and security of Indian tribes and families." 25 U.S.C. 1902.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2010

157

No. 09-960

Supreme Court, U.S.
FILED
MAR 19 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

WILLIAM H. HOGAN, in his Official Capacity as Commissioner of Alaska Department of Health and Human Services, *et al.*,

Petitioners,

v.

KALTAG TRIBAL COUNCIL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF EDWARD PARKS AND DONIELLE TAYLOR AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTRODUCTION

This case concerns a matter of extraordinary importance to the State of Alaska and its 690,000 citizens, approximately 37,000 of whom are children of Indian, Eskimo, or Aleut descent.[1]

Two of those children are amici curiae's daughters.

Because of the extraordinary importance of the case, amici curiae respectfully suggest that the Court expand the questions it will decide to include:

1. Whether the Ninth Circuit correctly held – in conflict with the doctrine of separation of powers – that a group of individuals of Native American descent can become a "federally recognized tribe" through a judicial decision rendered after an evidentiary hearing, even though Congress has not enacted a statute that confers that legal status and the Secretary of the Interior, acting lawfully pursuant to authority that Congress has delegated, has not conferred that legal status by final agency action?

2. Whether the Ninth Circuit correctly held that a "Native village" in Alaska, which

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[1] No counsel for a party has authored this brief in whole or in part. Alaska Public Interest Projects has made a monetary contribution to the cost of printing the brief. Counsel of record for the petitioners and respondents received notice of the intention of amici curiae to file this brief more than 10 days prior to the due date for the brief.

Congress has designated as an "Indian tribe" for the purposes of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq.*, has governmental authority to establish a "tribal court" that has jurisdiction to terminate parental rights and issue adoption decrees to which the State of Alaska must give full faith and credit, even though the ICWA "Indian tribe" has not petitioned the Secretary of the Interior pursuant to § 108 of ICWA, 25 U.S.C. § 1918, for jurisdiction?

INTEREST OF AMICI CURIAE

Amici curiae are parents who have been unlawfully deprived of custody of their children by an Alaska Native "tribal court."

EDWARD PARKS

Edward Parks is thirty-eight years old. His father is Caucasian. His mother is an Athabascan Indian. Mr. Parks was raised in, and until recently has always been a resident of, Fairbanks, Alaska. In 2006 Mr. Parks began a relationship in Fairbanks with Bessie Stearman, an Athabascan Indian who was raised in Minto but who in 2001 relocated to Fairbanks.

Minto is a cluster of houses on the Tolovana River 130 air miles northwest of Fairbanks. In 2000 Minto had a population of 258 persons, 237 of whom

were of Athabascan Indian descent. *See* http://www.commerce.state.ak.us/dca/commdb/CF_BLOCK.cfm [hereinafter "Alaska Community Database"]. In 1971 when it enacted the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 *et seq.*), Congress designated Minto as a "Native village" for the purposes of ANCSA. *See* 43 U.S.C. § 1610(b)(1).[1] Edward Parks is not, and has never been, a resident of Minto or a member of any Native organization affiliated with Minto.

On December 7, 2007 in Fairbanks Ms. Stearman gave birth to Mr. Parks's daughter, S.P., who Mr. Parks and Ms. Stearman began raising together. Ms. Stearman has a history of substance abuse problems. In May 2008 when Mr. Parks was working in the North Slope oil fields, unbeknownst to Mr. Parks, Ms. Stearman was incarcerated in Fairbanks on a probation violation. When he returned to Fairbanks Mr. Parks discovered that in his absence the Minto Tribal Court had convened *sua sponte* in Minto, had issued an "order" that purported to give the Native Village of Minto legal custody of S.P., and then had given

[1] For the purposes of ANCSA, a community is a "Native village" if it was "not of a modern and urban character" and it on the 1970 census enumeration date it had twenty-five or more Native residents who collectively were a majority of community residents. *See* 43 U.S.C. § 1610(b)(3). Congress defined the term "Native" as "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or combination thereof." *See* 43 U.S.C. § 1602(b).

physical custody of S.P. to "tribal" foster parents in Fairbanks, Rozella and Jeff Simmonds. Over Mr. Parks's repeated protestation, for the past twenty months Rozella and Jeff Simmonds have refused to relinquish physical custody of S.P. to Mr. Parks. In May 2009 the Minto Tribal Court issued an "order" in which it purported to terminate Mr. Parks's parental rights to S.P. In September 2009 Mr. Parks filed a custody action against Rozella and Jeff Simmonds in the Superior Court in Fairbanks, *Parks v. Simmonds*, No. 4FA-09-2508 CI (2009). In January 2010 Rozella and Jeff Simmonds moved the Superior Court to recognize and enforce the "order" of the Minto Tribal Court that deprives Mr. Parks of legal and physical custody of S.P. The Superior Court has not decided the motion.

DONIELLE TAYLOR

Donielle Taylor is thirty-three years old. Ms. Taylor is Caucasian and was born and raised in California. Between 1998 and 2000 Ms. Taylor lived in Evansville, Alaska, when she was married to her ex-husband Justin Costello. Mr. Costello had been raised in Evansville. His father was Caucasian. His mother, although three-quarters Caucasian, had a grandmother of Athabascan Indian and Inupiat Eskimo heritage.

Evansville is a cluster of houses on the Koyukuk River 180 air miles northwest of Fairbanks. In 2000 Evansville had a population of 28 persons, 14 of whom were of Athabascan Indian or Inupiat Eskimo

descent. *See* Alaska Community Database. In 1973 the Secretary of the Interior designated Evansville as a "Native village" for the purposes of ANCSA. *See* 43 U.S.C. § 1610(b)(3).

On August 12, 1999 Ms. Taylor gave birth to her and Mr. Costello's daughter, M.C. In 2000 Ms. Taylor's relationship with Mr. Costello ended and she and M.C. left Evansville. Since 2000 Ms. Taylor has had exclusive physical custody of M.C. From January 2008 to February 2010 Ms. Taylor and M.C. resided in Fairbanks where M.C. was enrolled in the fourth grade at Nordale Elementary School.

For reasons it has not explained, on January 18, 2010 in Evansville the Evansville Tribal Court convened *sua sponte* and, without Ms. Taylor's knowledge, issued an "order" that purported to give Evansville Village legal and physical custody of M.C. On the afternoon of January 18, 2010 Ms. Costello received a telephone call from an Evansville Village employee who informed her of the "order." The employee also informed her that the employee had taken M.C. from school and placed her in a "tribal" foster home at an undisclosed location in Fairbanks.

Ms. Taylor immediately telephoned the Fairbanks Police Department. But for the next week Ms. Taylor had no idea where her daughter was living. On January 26, 2010 Ms. Taylor regained physical custody of M.C. when the attorney who represents the Nordale Elementary School advised the school principal that the Evansville Tribal Court "order" had

no legal validity. In response, on February 10, 2010 Evansville Village filed *Evansville Village v. Taylor*, No. 4FA-10-1226 CI (2010), in the Superior Court in Fairbanks to attempt to have the Superior Court recognize and enforce against Ms. Taylor the January 18, 2010 "order" of the Evansville Tribal Court, as well as a second "order." On February 22, 2010 Ms. Taylor moved the Superior Court to dismiss *Evansville Village v. Taylor*. The Superior Court has not decided the motion.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS AMICI CURIAE SUGGEST ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

It is difficult to overstate the importance of this case. A majority of Alaska's citizens live in one city, Anchorage, and four towns, Fairbanks, Juneau, Sitka, and Ketchikan. But more than 100,000 Alaskans live in approximately 250 small rural communities scattered throughout the Alaska bush. Like Kaltag, the community in which respondent Kaltag Tribal Council is based, Congress or the Secretary of the Interior has designated more than 200 of those communities as "Native villages" for the purposes of ANCSA, even though thousands of Caucasians and other individuals

of diverse ethnic heritages reside in the communities.

This Court has recognized that *every* parent, including amici curiae, has a "fundamental right" to the "care, custody, and control" of his or her children. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000). However, child protection is one of every state government's most important responsibilities.

To balance the rights of parents and the responsibility of the State of Alaska to protect children from harm, the Alaska Legislature has enacted a carefully calibrated statutory structure. *See* A.S. 47.10.005 *et seq.* Among other features, that structure includes an impartial tribunal, i.e., a Superior Court judge, the right of an indigent parent to be represented by appointed legal counsel, decisions made based on evidence vetted by compliance with the Alaska Rules of Evidence, and a record made of every proceeding for the purposes of appeal. And every parent and every child enjoys every procedural and substantive right that the Alaska Constitution and the U.S. Constitution afford.

By contrast, if *Kaltag Tribal Council v. Jackson*, No. 08-35343 (9th Cir. Aug. 28, 2009), the unpublished memorandum decision of the Ninth Circuit that is the subject of the State of Alaska's petition,

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In 2000 Kaltag had a population of 230 persons, 194 Alaska Natives, 29 Caucasians, and 7 individuals of diverse ethnic heritages. *See* Alaska Community Database.

was correctly decided, in Alaska's more than 200 "Native villages" any individuals who claim Alaska Native descent who wish to do so can — without the approval of Congress — create a "tribal court" that *over the protestation of a parent* can not only deprive the parent of custody of his or her child, but *terminate* the parent's parental rights. And the State of Alaska must give full faith and credit to those actions.

That result would be disturbing enough if "tribal courts" confined the exercise of their ersatz jurisdiction to parents and children who have a relationship to the community in which the "tribal court" is located. But as the experiences of amici curiae document, "tribal courts" are routinely attempting to disrupt parent-child relationships in communities far distant from the communities in which the "tribal courts" are located. And they are intentionally disrupting parent-child relationships that involve non-Native parents such as Donielle Taylor and Native parents such as Edward Parks who have no relationship to, and want to have nothing to do with, the community in which the "tribal court" is located.

Simply put, this Court should exercise its jurisdiction and grant the State of Alaska's petition, not just to correct a decision wrongly decided, but to end a scandal.

II. THE NINTH CIRCUIT HAS ENTERED A DECISION THAT CONFLICTS WITH NUMEROUS RELEVANT DECISIONS OF THIS COURT.

In *Kaltag Tribal Council v. Jackson* the Ninth Circuit held that § 102(d) of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1911(d), requires the State of Alaska to give full faith and credit to an adoption decree that has been issued by a "tribal court" that has been created by respondent Kaltag Tribal Council because that result is "compelled" by a "binding precedent": *Native Village of Venetie IRA Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991).

But the Ninth Circuit holding in *Native Village of Venetie IRA Council* reflects a profound misunderstanding of the most fundamental of all tenants of Federal Indian law, as well as of the doctrine of separation of powers.

This Court has repeatedly instructed that the Indian Commerce Clause, U.S. CONST., Art. I, § 8, cl. 3, grants *Congress* – not the Secretary of the Interior, and certainly not a district or circuit court – "plenary and exclusive power over Indian affairs." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470 (1979); *Winton v. Amos*, 255 U.S. 373, 391 (1921) ("It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations"); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) ("Congress has plenary authority in all

areas in which it has substantive legislative jurisdiction").

For that reason, as the Committee on Natural Resources, which exercises jurisdiction over Native American-related legislation in the U.S. House of Representatives, has noted, the designation of a group of individuals of Native American descent as a "federally recognized tribe" is a "formal political act." *See* H.R. REP. No. 103-781, at 2-3 (1994). *Accord cf. Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 531 n. 6 (1998) ("because Congress has plenary power over Indian affairs, . . . some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country").

"Plenary" means "Full; complete; entire." *See* BLACK'S LAW DICTIONARY 1273 (9th ed. 2009).

Nevertheless, in *Native Village of Venetie IRA Council* the Ninth Circuit held that Congress's power over Native American policy is not plenary. Rather, according to the Ninth Circuit, even though Congress has not enacted a statute that designates a group of individuals of Alaska Native descent as a "federally recognized tribe," and even though Congress has not enacted a statute that delegates the Secretary of the Interior authority to confer that legal status by final agency action, the group can become a "federally recognized tribe," and hence "sovereign" – with the governmental authority that that legal status confers (as well as sovereign immunity) – if the group can

convince a district court that its members have "some relationship with or connection to" "entities which historically acted as bodies politic, particularly in the periods prior to their subjugation by non-natives." *Id.* 557. The Ninth Circuit explained its rationale for that holding as follows:

> [I]f native groups in Alaska were sovereign prior to the incorporation of the land mass into the United States, they could lose their sovereignty only by express act of Congress or assimilation by the natives into non-native culture.
>
> Indian sovereignty flows from the historical roots of the Indian tribe. Tribal sovereignty exists unless and until affirmatively divested by Congress. Thus, to the extent that Alaska's natives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities. (citations omitted).

Id. 558.

That extraordinary misstatement of constitutional law reflects a mistake about which Felix Cohen, who remains an influential commentator, long ago warned when he cautioned that "[t]he term 'tribe' is commonly used in two senses, an ethnological sense and a political sense. It is important to distinguish between these two meanings of the term." *See* HANDBOOK OF FEDERAL INDIAN LAW 268 (1942 ed.).

Prior to the United States's purchase of Alaska in 1867 nomadic Alaska Native family groups whose members lived together in winter villages were "tribes" in an ethnological sense.[4] In 1880 when he conducted the first United States census in Alaska, Ivan Petroff identified 283 such villages. *See* REPORT ON THE POPULATION, INDUSTRIES, AND RESOURCES OF ALASKA 11-12, 23, 28-29, 31 (1882). But that historical fact has nothing to do with the query that this Court's repeated acknowledgment of Congress's plenary authority to decide the nation's Native American policies required the Ninth Circuit to conduct in *Native Village of Venetie IRA Council*. And that query was: had Congress, or the Secretary of the Interior, acting lawfully pursuant to authority delegated by Congress, taken a "formal political act" (by ratifying a treaty, enacting a statute, or taking final agency action) that designated the plaintiffs in that action, i.e., the Athabascan Indian residents of the Native villages of Venetie and Fort Yukon, as "federally recognized tribes?" The answer to that query was then, and is now, no.

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[4] In *Montoya v. United States*, 180 U.S. 261, 266 (1901), this Court defined an ethnological tribe as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."

Having been directed by *Native Village of Venetie IRA Council* to do so, after conducting an evidentiary hearing, the district court held that the Athabascan Indian residents of Venetie were a "federally recognized tribe" because they had a

(Continued on following page)

As authority for its invention of what the district court in Alaska subsequently characterized as the "common law test" for tribal recognition the Ninth Circuit cited *United States v. State of Washington*, 641 F.2d 1368 (9th Cir. 1981), and *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979). But neither decision stands for the rule of law for which it was cited.

In *State of Washington* treaties which the Senate ratified in 1855 and 1859 had designated five groups of Native Americans – the Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom – as "federally recognized tribes." The question the Ninth Circuit

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connection to an Athabascan Indian group that, because it satisfied the *Montoya* factors, had been an ethnological tribe. *See Native Village of Venetie IRA Council v. State*, Nos. F86-75 and F87-51 CIV (Order: Decision – Tribal Status – Dec. 23, 1991). The district court then held that the fee title land within and surrounding Venetie was not Indian country. When the plaintiffs appealed the no-Indian country portion of the decision, for reasons unrelated to the legal merits, Alaska Governor Tony Knowles ordered his Attorney General not to appeal the tribal status portion of the decision. *See* Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction of Judicial Usurpation? Why History Counts*, 14 Alaska L. Rev. 353, 421 (1997) (Alaska Attorney General explaining to Alaska Legislature that "the decision of the Knowles Administration to withdraw the challenge to federal recognition of tribes in Alaska was not driven by litigation considerations"). As a consequence, in *Yukon Flats School District v. Venetie Tribal Government*, 101 F.3d 1286 (9th Cir. 1996), and *Alaska v. Native Village of Venetie Tribal Government*, *supra*, first the Ninth Circuit, and then this Court, simply assumed that the Athabascan Indian residents of Venetie were a "federally recognized tribe."

decided was whether certain individuals who claimed to be descendants of members of those "federally recognized tribes" could take advantage of certain treaty provisions. The status of the Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom as "federally recognized tribes" was not at issue.

In *Mashpee Tribe* the question the First Circuit decided was whether Congress had intended the word "tribe" in the Indian Nonintercourse Act of 1790, 25 U.S.C. § 177, to mean, in the nomenclature of Felix Cohen, "tribe in an ethnological sense" or "tribe in a political sense."

To the present day, when as a matter of policy it deems doing so appropriate, Congress continues to enact statutes that designate groups of individuals of Native American descent as "federally recognized tribes." *See e.g.*, Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (1983) ("Federal recognition is extended to the Tribe"). *And see most recently* H.R. 1385, 111th Cong. (2009) (bill whose enactment will create six new "federally recognized tribes" in the State of Virginia).[7] And in 1978 the Secretary of the Interior promulgated regulations that establish a procedure to enable a group of individuals of Native American descent to

[7] H.R. 1385 has passed the House – *see* 155 CONG. REC. H6101-15 (daily ed. June 3, 2009), and the Senate Committee on Indian Affairs has reported a companion bill, S. 1178, 111th Cong. (2009) – *see* S. REP. No. 111-113 (2009).

petition the Secretary to designate the group as a "federally recognized tribe." *See* 25 C.F.R. § 83.1 *et seq.* (2009).[1]

But if the Ninth Circuit correctly decided *Native Village of Venetie IRA Council*, a group of individuals of Native American descent can (not only in Alaska but also in eight other western states) circumvent Congress and the Secretary's petition procedure if it can convince a district court that its members have "some relationship with or connection to" an historic ethnological tribe. However, the Indian Commerce Clause does not allow the judiciary to assume a role that the Clause reserves exclusively to Congress.

Finally and most importantly, the Ninth Circuit's reaffirmation in *Kaltag Tribal Council v. Jackson* of its invention in *Native Village of Venetie IRA Council* of its "common law test" for tribal recognition violated the doctrine of separation of powers. As this Court admonished in *Lichter v. United States*, 334 U.S. 742, 779 (1948), and *National R.R. Corp. v. Atchison Topeka Co.*, 470 U.S. 451, 466 (1985), "it is essential that . . . the respective branches of the Government keep within the powers assigned to each by the Constitution," and that "the principal function of

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[1] In recognition that Congress had long ago decided not to create "federally recognized tribes" in Alaska, 25 C.F.R. § 83.3(a) provides: "This part applies only to those American Indian groups indigenous to the *continental* United States which are not currently acknowledged as Indian tribes by the Department." (emphasis added)

a legislature is . . . to make laws that establish the policy of the state."

In disregard of those holdings, the Ninth Circuit has usurped Congress's Indian Commerce Clause authority to decide Native American policy.

III. THE NINTH CIRCUIT HAS ENTERED A DECISION THAT CONFLICTS WITH THE INDIAN CHILD WELFARE ACT.

In 1884 when it enacted the Alaska Organic Act, 23 Stat. 24, to give the District of Alaska its first civil government Congress made a policy decision that it would not create "federally recognized tribes" in Alaska. Instead, Alaska Natives at all locations in the District, including in communities that today are ANCSA "Native villages," would be subject to the same laws to which all other residents of the District were subject.*

That was the jurisdictional situation in 1891 when Alaska Governor Lyman Knapp advised Congress:

> Since the passage of th[e Alaska Organic] Act, if not before, the courts assumed jurisdiction to try Indian offenders according to

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* Congress made that decision because beginning in 1880 the objective of its Indian policy was to prepare all Native Americans for eventual citizenship. *See* FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984).

> the laws of the United States, in no case allowing local customs among the tribes or native people to have any determining influence upon questions of punishment, as has ever been the case in the States where the tribal relation is recognized.

H.R. EXEC. DOC. No. 1, Pt. 5, 52d Cong. 498 (1891).

That was the jurisdictional situation in 1932 when Secretary of the Interior Ray Lyman Wilbur advised Congress:

> In the United States statutes Alaska has never been regarded as Indian country. The United States has had no treaty relations with any of the aborigines of Alaska nor have they been recognized as the independent tribes with a government of their own. The individual native has always and everywhere in Alaska been subject to the white man's law, both Federal and territorial, civil and criminal.

Letter from Ray Lyman Wilbur to the Hon. Edgar Howard (March 14, 1932), *reprinted in Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 before the Senate Comm. on Indian Affairs*, 72d Cong. 15-16 (1932).

And that was the jurisdictional situation in 1958 when, after reviewing Congress's Alaska Native related enactments, the Alaska Supreme Court concluded:

> In a series of enactments following the Treaty of Cession [in 1867] and extending into the first third of this century, Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status. The historical accuracy of this conclusion was expressly recognized in the proviso to the Alaska Indian Reorganization Act [of 1936]. . . . No enactment subsequent to the Alaska Indian Reorganization Act granted or recognized tribal sovereign authority in Alaska.

Native Village of Stevens v. A.M.P., 757 P.2d 32, 41 (Alaska 1988).[9]

But because the power the Indian Commerce Clause grants is plenary, even though it long ago decided not to create "federally recognized tribes" in

[9] In *John v. Baker I*, 982 P.2d 738, 749-50 (Alaska 1999), the Alaska Supreme Court reaffirmed the validity of its analysis in *Native Village of Stevens* of the history of Congress's Alaska Native-related enactments. However, the court then held that, in its view, Congress intended its enactment in 1994 of the Federally Recognized Indian Tribe List Act (FRTLA), Pub. L. No. 103-454, Title I, 108 Stat. 4791 (codified in part at 25 U.S.C. § 479a *et seq.*), to delegate the Secretary of the Interior authority to create "federally recognized tribes" in Alaska in Congress's stead simply by publishing in the Federal Register a list of "Native Entities Within the State of Alaska," which the Secretary did in 1995, *see* 60 Fed. Reg. 9250, 9254-55 (1995). While the validity of that misinterpretation of the intent of Congress embodied in FRTLA is not at issue here, *John v. Baker I* illustrates the continued confusion regarding Alaska Native tribal status.

Alaska, Congress has designated groups whose members are of Alaska Native descent as "Indian tribes" for specific purposes.

For example, in the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450b *et seq.*), Congress designated the more than 200 business corporations that Alaska Natives have incorporated under the State of Alaska corporation code to obtain the land and monetary benefits of ANCSA as "Indian tribes" for the singular purpose of contracting for the delivery of federal programs and services to Alaska Natives. *See* 25 U.S.C. § 450b(e).

Similarly, in § 4(8) of ICWA, 25 U.S.C. § 1903(8), Congress included "Alaska Native village[s] as defined in § 1602(c) of title 43 [i.e., of ANCSA]" as "Indian tribe[s]" for the purposes of ICWA. The principal benefit of that inclusion is to grant Alaska Native ICWA "Indian tribes" a statutory right to intervene in proceedings of the Alaska Superior Court that involve "the foster care placement of, or termination of parental rights to" a child who is a member of, or eligible for membership in, the ICWA "Indian tribe." *See* 25 U.S.C. § 1911(c).

However, in § 108 of ICWA, 25 U.S.C. § 1918, Congress provided ICWA "Indian tribes" "which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 [Pub. L. No. 83-280] . . . *or pursuant to any other Federal law*"

(emphasis added) a procedural means to "reassume (sic) jurisdiction over child custody proceedings."[10]

The way § 108 of ICWA permits an ICWA "Indian tribe" to "reassume" jurisdiction is by petitioning the Secretary of the Interior. When Congress enacted ICWA, the House Committee on Interior and Insular Affairs explained that it had included § 108 in ICWA specifically because of the jurisdictional situation in Alaska. *See* H.R. REP. No. 95-1386, at 25 (1978) ("[Section 108] was adopted as an amendment in order to take into consideration special circumstances, such as those occurring in *Alaska* and Oklahoma") (emphasis added).

Chevak and Barrow are the only Alaska Native ICWA "Indian tribes" that have filed § 108 petitions which the Secretary of the Interior has approved. *See* 64 Fed. Reg. 36,391-92 (1999). However, in *Native Village of Venetie IRA Council* the Ninth Circuit held that Congress did not intend the Alaska Native ICWA "Indian tribes" at Venetie and Fort Yukon (and, by inference, at Kaltag, Minto, Evansville, and more than 200 other communities that are ANCSA "Native villages") to have to file a § 108 petition because Congress did not intend Pub. L. No. 83-280 to deprive

[10] Section 4(1) of ICWA, 25 U.S.C. § 1903(1), defines the term "child custody proceeding" to include "termination of parental rights" and "adoptive placement," i.e., the actions of the Kaltag "tribal court" that respondent Kaltag Tribal Council filed this action to try to compel the State of Alaska to give full faith and credit

any Alaska Native ICWA "Indian tribe" of "concurrent" jurisdiction.

Among its other defects, the Ninth Circuit's holding wrote the phrase "or pursuant to any other Federal law" out of § 108. Because it was not Pub. L. No. 83-280 that granted the State of Alaska exclusive jurisdiction over "child custody proceedings" at all locations in Alaska, including in ANCSA "Native villages." It was "[an]other Federal law": the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

THE ADVERSE EFFECT OF THE DECISION BELOW

In *Kaltag Tribal Council v. Jackson* and *Native Village of Venetie IRA Council* the Ninth Circuit's disregard of the plenary power the Indian Commerce Clause grants to Congress and its lack of understanding of the history of Congress's Alaska Native policy are inexplicable. As the State of Alaska has explained in its petition, if the Ninth Circuit's error is not corrected, in more than 200 communities that are ANCSA "Native villages," and, as amici curiae's experiences document, also in Anchorage, Fairbanks, Juneau, Sitka, and Ketchikan, the Alaska Superior Court will be divested of its exclusive jurisdiction over child custody proceedings that Congress conferred more than half a century ago in the Alaska Statehood Act. And amici curiae and other parents –

both Native and non-Native – who have found themselves entangled involuntarily with Alaska Native "tribal courts" will continue to have their custody relationships with their children disrupted in violation of procedural and substantive rights that the United States and Alaska Constitutions and the Alaska statutes guarantee.

CONCLUSION

For the foregoing reasons, amici curiae urge the Court to grant the State of Alaska's petition for a writ of certiorari.

Respectfully submitted,

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